86-656 (1)
No.

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ROGER CLEGG
Assistant to the Solicitor General
MICHAEL JAY SINGER
JOEL W. NOMKIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ABRAHAM D. SOFAER
Legal Adviser
Department of State
Washington, D.C. 20520

129 pp

QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien only if his activities—and not just his presence or entry—would be prejudicial to the public interest.

2. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien based on foreign policy concerns only if those concerns are independent of—and not merely in addition to—the alien's affiliation with organizations listed in 8 U.S.C. 1182(a)(28).

PARTIES TO THE PROCEEDING

Petitioners in *Reagan* v. *Abourezk* are Ronald Wilson Reagan, George P. Shultz, William French Smith, and Alan C. Nelson; petitioners in *Shultz* v. *City of New York* and *Cronin* v. *Shultz* are George P. Shultz, William French Smith, and Alan C. Nelson. The respondents in *Reagan* v. *Abourezk* are James Abourezk, Douglas Cassel, Jr., John Coatsworth, Rev. Harvey Cox, Don Edwards (individually and as a Member of the House of Representatives), Sidney Lens, George Overton, Richard Parker, Charles E. Schumer (individually and as a Member of the House of Representatives), James M. Shannon (individually and as a Member of the House of Representatives), Paul Tsongas (individually and as a Member of the House of Representatives), Mortimer B. Zuckerman, the Chicago Lawyer, Ltd., The Chicago Religious Task Force on Central America, First Parish Church of Concord, Massachusetts, Institute for Policy Studies, Unitarian Universalist Service Committee, Washington Office on Latin America, Dr. Dana McLean Greeley, and Phillippe Villers; the respondents in *City of New York* v. *Shultz* are the City of New York, Edna Acosta-Belen, Chai Feldblum, Jill Gay, Thomas H. Holloway, Sally McConnell-Ginet, Barbara Corrado Pope, David S. Rudstein, Mary Kay Vaughan, Committee on Religion, Ethics and Social Policy, Committee on U.S.-Latin American Studies, Institute for Policy Studies, and the New College of California; respondents in *Cronin* v. *Shultz* are Bruce Cronin, Judith Freiwirth, Anthony Palomba, Mobilization for Survival, Boston Mobilization for Survival, and New England Campaign to Stop the Euromissiles.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	4
Reasons for granting the petition	16
Conclusion	28
Appendix A	1a
Appendix B	65a
Appendix C	81a
Appendix D	82a
Appendix E	84a
Appendix F	85a
Appendix G	86a
Appendix H	89a
Appendix I	92a

TABLE OF AUTHORITIES

Cases:

Allende v. *Shultz*, 605 F.Supp. 1220	13
Castro-Guerrero v. *INS*, 515 F.2d 615	25
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837	14, 18, 20, 24
Diaz, In re, 15 I. & N. Dec. 488	25
Haig v. *Agee*, 453 U.S. 280	21
Harisiades v. *Shaughnessy*, 342 U.S. 580	20, 28
Heckler v. *Mathews*, 465 U.S. 728	17
Kent v. *Dulles*, 357 U.S. 116	21
Kleindienst v. *Mandel*, 408 U.S. 753	11, 16, 17, 18, 20, 27
Knauff v. *Shaughnessy*, 339 U.S. 537	20-21
MacKenzie v. *Hare*, 239 U.S. 299	21
Mathews v. *Diaz*, 426 U.S. 67	25, 28
Regan v. *Wald*, 468 U.S. 222	20
Reid v. *INS*, 420 U.S. 619	25
Shaughnessy v. *Mezei*, 345 U.S. 206	17, 28

Cases—Continued: Page

The Chinese Exclusion Case, 130 U.S. 581 17
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 19

Constitution, statutes and regulation:

U.S. Const. Amend. I 11, 12, 16
Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. II) 1101 *et seq.*:
8 U.S.C. 1101(a)(15) 4
8 U.S.C. 1103 4
8 U.S.C. 1103(a) 21
8 U.S.C. 1104 4
8 U.S.C. 1181(a) 4
8 U.S.C. (& Supp. II) 1182 2
8 U.S.C. (& Supp. II) 1182(a) 5
8 U.S.C. 1182(a)(26) 4
8 U.S.C. 1182(a)(27) ..... *passim*
8 U.S.C. 1182(a)(28) 5, 13, 14, 15, 21, 22, 23, 24
8 U.S.C. 1182(a)(29) 18
8 U.S.C. 1182(d)(3) 16
8 U.S.C. 1182(d)(3)(A) 5
8 U.S.C. 1201 4
8 U.S.C. 1201(g) 4
8 U.S.C. 1202 4
8 U.S.C. 1361 4
55 Stat. 252 19
22 U.S.C. 2691 ..... 3, 5, 11
22 U.S.C. 2691(a) 6
22 U.S.C. 2691(b) 23
Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 1006 ..... 19, 20
22 C.F.R 41.90 4

Miscellaneous:

87 Cong. Rec. 4757 (1941) 19
125 Cong. Rec. 8345 (1979) 23
Dep't of State, Bureau of Consular Affairs, *Reports of the Visa Office* (FY – 1980, 1981, 1983) 6

Miscellaneous – Continued: Page

9 Dep't of State, Foreign Affairs Manual, Pt. II (1975) ... 7, 12

Dep't of State, *World Peace Council: Instrument of Soviet Foreign Policy*, Foreign Affairs Note (April 1982) 24

Exclusion and Deportation Amendments: Hearings on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984) 6

H.R. Conf. Rep. 3112, 91st Cong., 2d Sess. (1950) 20

H.R. Conf. Rep. 95-537, 95th Cong., 1st Sess. (1977) 22

H.R. ~~Conf.~~ Rep. 1365, 82d Cong., 2d Sess. (1952) 19

1 Op. Off. Legal Counsel 64 (1977) 21

S. Rep. 386, 77th Cong., 1st Sess. (1941) 19

S. Rep. 2230, 81st Cong., 2d Sess. (1950) 19

S. Rep. 1137, 82d Cong., 2d Sess. (1952) 19

S. Rep. 95-194, 95th Cong., 1st Sess. (1977) 23

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of State and all other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-64a) is reported at 785 F.2d 1043. The opinion of the district court (App., *infra*, 65a-80a) is reported at 592 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 82a-83a) was entered on March 11, 1986. A petition for rehearing and a suggestion for rehearing en banc were denied on May 23, 1986 (App., *infra*, 84a, 85a). On August 13, 1986, Justice White extended the time for filing a petition for a writ of certiorari to September 20, 1986. On September 16, 1986, Chief Justice Burger further extended the time for filing to and including October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1182 provides in relevant part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political

or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt * * *.

* * * * *

22 U.S.C. 2691 provides:

(a) For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by an alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

(b) This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) This section does not apply with respect to any alien who is a member, official, representative, or spokesman of the Palestine Liberation Organization.

(d) The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.

STATEMENT

1. a. The terms and conditions under which aliens may enter the United States, as visitors or as immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. II) 1101 *et seq.* (Immigration Act or Act). The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104.

With exceptions not relevant here, no alien may be admitted to the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26). Nonimmigrant visas are issued to aliens seeking entry into the United States for one or more of the purposes specified in 8 U.S.C. 1101(a)(15). The authority to grant or deny such visas is assigned to consular officers (8 U.S.C. 1201, 1202), and no visa may be issued if the consular officer "knows or has reason to believe" that the applicant is ineligible to receive a visa under the Act (8 U.S.C. 1201(g)).[1]

---

[1] The alien has "the burden of proof * * * to establish that he is eligible to receive such visa * * * or is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361. Any alien may apply or reapply for a visa at any time, and each visa application is given independent consideration by the consular officer on the basis of the facts and circumstances known at the time of the particular application. See 22 C.F.R. 41.90.

Section 1182(a) of the Act lists 33 separate categories of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States." Two categories are at issue in this case, 8 U.S.C. 1182(a)(27) (Subsection 27) and 8 U.S.C. 1182(a)(28) (Subsection 28). Subsection 27 applies to "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Subsection 28 applies, inter alia, to aliens who are, or at any time have been, "members of or affiliated with * * * the Communist or any other totalitarian party * * * of any foreign state, [or] * * * any * * * affiliate * * * of any such * * * party."

Under 8 U.S.C. 1182(d)(3)(A), aliens falling into 30 of the 33 categories contained in Section 1182(a) may, in certain circumstances, still be granted a visa. A visa may issue to such aliens if, inter alia, the Secretary of State or consular officer recommends that a visa be granted, and the Attorney General, in his discretion, approves the recommendation. Subsection 28 is one of the categories subject to this waiver of ineligibility; Subsection 27 is one of the three categories that is not.

Certain standards for the Secretary of State's determination whether to recommend a waiver to the Attorney General under Section 1182(d)(3)(A) for aliens otherwise excludible under Subsection 28 are prescribed by 22 U.S.C. 2691, commonly known as the McGovern Amendment. The Amendment provides that the Secretary "should" make such a waiver recommendation in the case of "any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization," unless the Secretary certifies to Congress that "the admission of such alien would be contrary to the

security interests of the United States." 22 U.S.C. 2691(a). The Amendment provides, however, that it does not authorize or require "the admission * * * of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." *Ibid.*

b. Applications for nonimmigrant visas do not typically raise foreign policy concerns.[2] In certain cases, however, the decision whether to grant or deny a visa has significant diplomatic consequences. As explained in the affidavit of then-Under Secretary of State for Political Affairs Lawrence S. Eagleburger (C.A. App. A137):[3]

> The overwhelming majority of NIV [nonimmigrant visa] applications involve only the ordinary circumstances of aliens seeking to visit the United States for

---

[2] According to an affidavit filed in the district court in March 1984, for the preceding 20-year period in which the State Department had kept such statistics (1963-1983), consular officers issued nearly 70 million nonimmigrant visas, and denied (on foreign policy *or* internal security grounds) only 519 applications for such visas under Subsection 27 (C.A. App. A161). During the most recent period, from 1981 through 1983, six to seven million nonimmigrant visas had been granted annually, and an average of less than 30 were denied under Subsection 27 (*ibid.*). These figures are also found in the Statement of Joan Clark, Assistant Secretary of State for Consular Affairs, Department of State, *Exclusion and Deportation Amendments: Hearings on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 90 (1984); and Dep't of State, Bureau of Consular Affairs, *Reports of the Visa Office* (FY–1980, 1981, 1982).

[3] In the district court, in support of its motion to dismiss or, in the alternative, for summary judgment, the government submitted one public affidavit of Under Secretary Eagleburger (C.A. App. A135-A152) and two public affidavits of Deputy Assistant Secretary of State Louis P. Goelz (*id.* at A153-A167, A304-A308). The government also filed three classified affidavits from Under Secretary

reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

For these reasons, the Department of State provides special guidance to its consular officers whenever visa applications raise national security or foreign policy concerns. In such cases, agency guidelines require consular officers to refer the case to the Department for an advisory opinion prior to the issuance or refusal of a visa. Advisory opinions are particularly required when a consular officer has reason to believe that an applicant may be ineligible under Subsection 27. See C.A. App. A137-A140; 9 Dep't of State, Foreign Affairs Manual, Pt. II, § 41.91(a)(27) (1975). The Department renders an advisory opinion "only after a thorough review of the information available to

---

Eagleburger, which were submitted for the district court's in camera inspection (App., *infra*, 86a-94a). These classified affidavits were also submitted in camera to the court of appeals.

Following the remand of these cases from the court of appeals, the government determined that the passage of time would permit declassification of nearly all of the in camera affidavits. Only one paragraph and part of one sentence in one of the affidavits (see App., *infra*, 92a, 94a) remain classified. The affidavits, as declassified, have been provided to respondents.

the Department and the recommendations of those officers responsible for the geographic and policy areas affected" (C.A. App. A140). Only the Assistant Secretary of State for Consular Affairs or a superior officer may issue an opinion advising against issuance of a visa on foreign policy grounds (*id.* at A161). In sensitive cases, the Secretary of State or his immediate designee (such as the Under Secretary of State for Political Affairs) may make the determination (*ibid.*).

2. Tomas Borge, Olga Finlay, Leonor Rodriguez Lezcano, and Nino Pasti applied for nonimmigrant visas to meet and talk with American citizens who had invited them to come to the United States. Based on advisory opinions from the Department of State, consular officers denied each application under Subsection 27.

a. Tomas Borge was invited by the plaintiffs in *Abourezk* v. *Reagan*.[4] Borge is the Interior Minister of Nicaragua, and one of the highest ranking and most influential members of the Sandinista Front for National Liberation, the ruling body of Nicaragua (App., *infra*, 86a; C.A. App. A162). In November 1983, the Nicaraguan government submitted a diplomatic note to the United States Embassy in Managua, Nicaragua, requesting that Borge be issued a nonimmigrant visa for a five-day visit to the United States (C.A. App. A162-A163). The request was accompanied by a diplomatic passport that the Nicaraguan government had issued to Borge (App., *infra*, 86a-87a).

Under Secretary Eagleburger rendered an advisory opinion that Borge was ineligible for a visa under Subsection 27 because his admission would be "highly prejudicial

---

[4] The plaintiffs in *Abourezk*—members of Congress, university professors, journalists, and religious leaders—invited Borge to the United States to discuss issues regarding Central America and Nicaragua. See App., *infra*, 5a, 66a; C.A. App. A18.

to the foreign policy interests of the United States" (App., *infra*, 88a). See also C.A. App. A141, A163. In making this judgment, Eagleburger concluded, inter alia, that Borge "intended to travel to the United States *in his official capacity*," and that his admission at that particular time would send "a very wrong message to our allies and adversaries alike concerning United States policies in Central America, and could have had a severely adverse impact on ongoing multilateral efforts by the United States to resolve the current conflict in that region" (App., *infra*, 86a-87a (emphasis in original)). Eagleburger further noted that a visit in October 1983 by the Foreign Minister of Nicaragua had "undercut * * * multilateral negotiations" (*id.* at 87a).

b. Olga Finlay and Leonor Rodriguez Lezcano were invited by the plaintiffs in *City of New York* v. *Shultz*.[5] Both are officials of the Communist Party of Cuba, and both are members of the Federation of Cuban Women, an organization which the Department of State has determined to be affiliated with and controlled by the Cuban Communist Party (App., *infra*, 89a; C.A. App. A164-A165). Finlay, in addition, is the Cuban representative to the United Nations Commission on the Status of Women (C.A. App. A164-A165). In September 1983, Finlay and Lezcano applied for 30-day, nonimmigrant visas to the United States. Their applications were accompanied by diplomatic passports, and were transmitted to the consular officer in Havana, Cuba, by diplomatic note. App., *infra*, 90a; C.A. App. A165.

---

[5] The plaintiffs in *City of New York*—the New York City Commission on the Status of Women and several women's studies programs at various universities—invited Finlay and Lezcano to the United States to discuss issues concerning women. See App., *infra*, 6a, 67a; C.A. App. A33-A34.

The Assistant Secretary for Consular Affairs, in an advisory opinion ratified by Under Secretary Eagleburger, concluded that Finlay and Lezcano were ineligible for visas under Subsection 27, since their entry would prejudice the foreign affairs of the United States (C.A. App. A142-A143, A165-A166). In Eagleburger's view, both applicants "intended to travel to the United States not as private Cuban citizens, but rather as official representatives of the Cuban Government" (App., *infra*, 90a; see C.A. App. A142), and "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (C.A. App. A142). He determined that their entry would be inconsistent with our foreign policy toward Cuba, a policy which seeks to curb Cuban influence in Central and South America by denying to it "the aura of legitimacy which normal diplomatic relations with the United States would undoubtedly confer" (App., *infra*, 90a).

c. Nino Pasti was invited by the plaintiffs in *Cronin* v. *Shultz*.[6] Formerly a general in the Italian military and a member of the Italian Senate, Pasti is an active participant in the World Peace Council, an organization which the State Department has determined is "controlled and financed" by, and is an "instrumentality" of, the Soviet Union (App., *infra*, 92a; C.A. App. A163). In September 1983, Pasti applied to the American Embassy in Rome for a nonimmigrant visa (C.A. App. A163).

As in the other cases, Pasti's application was referred by the consular officer to the Department of State for an advisory opinion (C.A. App. A163-A164). The opinion, authored by the Assistant Secretary of State for Consular

---

[6] The plaintiffs in *Cronin* are principally groups advocating nuclear disarmament. They invited Pasti to attend and speak at a rally in Boston. App., *infra*, 5a, 66a-67a; C.A. App. A47.

Affairs, concluded that Pasti was ineligible to receive a visa under Subsection 27, because his admission would prejudice the conduct of United States foreign policy (*id.* at A142, A164). In ratifying the opinion, Under Secretary Eagleburger noted that the World Peace Council is an instrument of Soviet efforts to disrupt American foreign policy; he emphasized that the timing of Pasti's proposed trip coincided with the "particularly delicate period" during the controversial "initial deployment of Cruise and Pershing II missiles in certain NATO countries" (App., *infra*, 92a-94a).

3. a. The individuals and groups who invited these four aliens each filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. Plaintiffs alleged that the government acted without statutory authority in denying the visas because: Subsection 27 does not authorize exclusion on the basis of foreign policy (as opposed to national security) concerns; Subsection 27 does not authorize the exclusion of an applicant when it is his mere entry or presence (as opposed to the specific activities in which he intends to engage) that will be prejudicial to the public interest; and the government's interpretation of Subsection 27 is contrary to the McGovern Amendment, 22 U.S.C. 2691. Plaintiffs also complained that the visa denials in these cases violated their First Amendment rights to associate with their invitees and listen to them in this country. App., *infra*, 14a; C.A. App. A16-A58.

The district court entered summary judgment for the government (App., *infra*, 81a). Judge Greene rejected each of plaintiffs' statutory arguments, concluding that the government's actions were fully within the ambit of Subsection 27 (App., *infra*, 72a-75a). The court further held that under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the facially legitimate and bona fide reasons ad-

vanced by the government in support of its actions defeated plaintiffs' First Amendment claims (App., *infra*, 75a-80a).

b. On appeal, a divided panel vacated the district court's judgment and remanded for further proceedings (App., *infra*, 82a-83a). The court agreed with the government that Subsection 27 may properly be invoked to deny visas because of foreign policy concerns (*id.* at 14a-16a), but ruled against the government and remanded on two other statutory issues.[7]

It found, first, that the record was inadequate to decide whether Subsection 27 permits exclusion based only on concerns sparked by an alien's entry or presence in the United States (App., *infra*, 16a-22a). In reaching this conclusion, the court noted that the language of Subsection 27 refers only to an alien's expected "activities," not his presence or entry (*id.* at 16a). Nor, in the court's view, did the legislative history resolve the issue in the government's favor; instead, the court found that the history "is terse and tugs in more than one direction" (*id.* at 17a). Similarly, the court found that the evidence of administrative practice was too "meager" to give rise to a presumption of congressional acquiescence in the government's view that Subsection 27 applies to entry or presence (*id.* at 21a).[8] Nevertheless, believing that "[i]nformation about such acquiescence, or the absence of it, would rank as a signifi-

---

[7] The court also rejected the government's threshold objections to judicial review: that the cases were moot, that plaintiffs lacked standing, and that the district court lacked subject matter jurisdiction (App., *infra*, 8a-13a).

[8] The court nevertheless found in the record "at least one instance, of which Congress was apprised," in which the State Department actually excluded an alien because of concerns about his mere presence in the United States (App., *infra*, 21a). The court also recognized that 9 Dep't of State, Foreign Affairs Manual, Pt. II, § 41.91 (a)(27)(1.4) (1975) gave as an example of an alien excludible under Subsection 27 one who engaged in physical brutality while in

cant indicator of the legislature's will" (*id.* at 18a), the court remanded for "fuller proceedings" on the nature of administrative practice under Subsection 27 (*id.* at 22a).

Second, the court ruled that the district court had improperly analyzed the relationship between Subsection 27 and Subsection 28 (App., *infra*, 22a-30a). The court held that the government may exclude aliens under Subsection 27 for foreign policy reasons only if those reasons are "*independent of*" and not merely "*in addition to*" the fact that the aliens are members of, or affiliated with, the communist and anarchist organizations listed in Subsection 28 (*id.* at 24a (emphasis in original)). Any other holding, the court reasoned, would "nullif[y]" the restrictions placed by the McGovern Amendment on the use of Subsection 28 (*id.* at 23a); for this point the court (*id.* at 23a-24a n.16) relied in part on a similar holding in *Allende* v. *Shultz*, 605 F.Supp. 1220 (D. Mass. 1985). In adopting this interpretation, the court recognized that affiliation with a hostile government may qualify as proper grounds for the denial of a visa under Subsection 27, but held that such affiliation may not be "presumed *because of* the applicant's membership or participation in a subsection (28) organization" (*id.* at 27a (emphasis in original)). The court therefore remanded for a determination as to whether governmental affiliation, independent of organizational affiliation, was "*the* reason" for the exclusions in these cases (*id.* at 27a-28a (emphasis in original)).

In view of its rulings on the statutory issues, the court declined to consider plaintiffs' constitutional claims (App., *infra*, 30a n.24).

c. Judge Bork dissented (App., *infra*, 34a-64a). He concluded that the majority's decision deprived the Executive "of much of the flexibility and nuance that are

---

political power (App., *infra*, 19a-20a); the court acknowledged that this "example in the Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone" (*id.* at 20a).

essential in the conduct of foreign relations" (*id.* at 60a), and began "a process of judicial incursion into the United States' conduct of its foreign affairs" (*id.* at 64a).

Judge Bork criticized the majority's analysis of the "mere entry/presence" issue (App., *infra*, 38a-47a). In his view, the legislative history of Subsection 27 and its statutory predecessors unambiguously settles the question. That history, he found, includes at least six occasions in which Congress clearly interpreted the term "activities" to "encompass[] entry and presence as well" (*id.* at 42a; see *id.* at 38a-42a). Furthermore, to the extent that the issue could be considered close, Judge Bork noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the courts must defer to a reasonable administrative interpretation, especially in the foreign policy context (App., *infra*, 36a-38a, 43a). Applying the *Chevron* test, he found "it difficult to understand how an interpretation offered half a dozen times by Congress * * * can possibly be unreasonable when adopted by officials in the executive branch" (*id.* at 43a). Given the reasonableness of the Executive's view that Subsection 27 applies to mere presence or entry, Judge Bork found no need for evidence of congressional acquiescence, and thus no need for the majority's remand on this issue (id. at 44a-47a). Moreover, Judge Bork found that evidence supporting the government's position already existed in the record (*id.* at 44a-45a n.2).

Judge Bork also disagreed with the majority's interpretation of the McGovern Amendment and its analysis of the relationship between Subsections 27 and 28 (App., *infra*, 47a-60a). He thought it clear, based on the statute's language and legislative history, that Congress intended the restrictions in the Amendment to apply only "when the sole ground for exclusion is membership in an organization of the sort described [in Subsection 28]. When that membership raises additional concerns, as it does when it

involves a connection to a government that implicates American foreign policy, subsection (27) comes into play," and the McGovern Amendment does not apply (*id.* at 53a). Since in the present cases the Executive has "consistently cited" the aliens' affiliations with particular foreign governments as the basis for exclusion, Judge Bork concluded that the McGovern Amendment was inapposite (*id.* at 54a). Judge Bork emphasized that his interpretation fully serves the intent of the McGovern Amendment, since it would not justify the wholesale exclusion of all communists, but only those whose organizations are connected to foreign governments (*id.* at 55a-56a). Judge Bork wrote, for example, that "[i]t would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country" (*id.* at 55a). On the other hand, he pointed out that the majority's interpretation leads to the anomalous result of "confer[ring] upon communists a favored entry status": members of non-Subsection 28 organizations may be excluded under Subsection 27 because their organizations are tied to hostile regimes, but members of Subsection 28 groups may not (*id.* at 56a). Further, Judge Bork noted that the majority's construction, although adopted to prevent the Executive from "evading" the McGovern Amendment, is "toothless"—and thus fails on its own rationale—for two reasons (*id.* at 57a-59a). First, because the Amendment states only that the Secretary of State "should"—not "shall"—recommend the admission of a member of a proscribed organization, "it is at least an open question whether the terms of the * * * Amendment are in fact mandatory" (*id.* at 57a). Second, even if the Secretary were obligated to render a favorable recommendation,

the Attorney General, under 8 U.S.C. 1182(d)(3), would have complete discretion not to accept it (App., *infra*, 58a-59a).

Having concluded that Subsection 27 thus authorized the exclusions in these cases, Judge Bork also addressed plaintiffs' First Amendment argument. He found this argument "obviously" without force under *Kleindienst* v. *Mandel*, *supra*, and other "clear and consistent" Supreme Court precedent (App., *infra*, 60a, 63a). Judge Bork pointed out that the aliens here were not denied visas because of the content of their political beliefs, but because they "are members of or connected with particular foreign governments" (*id.* at 62a). Judge Bork also rejected plaintiffs' argument that the discretion delegated to the Executive under Subsection 27 is so broad that it violates separation of powers principles; he found the challenge insubstantial under the many rulings by this Court upholding the constitutionality of "broad and discretionary Executive power" (*id.* at 63a).

d. The government petitioned the court of appeals to rehear these cases en banc. Of the court's eleven judges, five voted in favor of granting the petition, four voted against, and two did not participate in the vote. Accordingly, the petition was denied. App., *infra*, 85a.

REASONS FOR GRANTING THE PETITION

These cases raise important questions about the authority of the Executive to deny visas on foreign policy grounds and, more generally, about the proper scope of judicial review of Executive foreign policy judgments. In remanding for more evidence on the government's practice of excluding aliens because of harm that might result from their mere entry or presence, the court of appeals has erroneously failed to defer to the Executive's reasonable interpretation of the governing statute, and has set the stage for further proceedings that would improperly intrude into

sensitive matters of foreign policy. Moreover, in extending the McGovern Amendment to narrow the government's ability to exclude aliens affiliated with hostile regimes, the court of appeals has contravened congressional intent and again overturned the reasoned view of the Executive.

In both instances, the panel has established a precedent that greatly weakens an important tool of foreign policy. Further, by demanding additional fact-finding regarding the exclusion orders in these—and future—cases, the court of appeals has opened the door to inquiry into an area which this Court has carefully safeguarded from judicial interference. Ever since *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), the "[c]ourts have * * * recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (*Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)). If the court of appeals' intrusion into this area is allowed to stand, it will not only enmesh the courts in questions outside the bounds of judicial competence, it will cast a chill over Executive decisionmaking and impair the conduct of foreign policy.

These results cannot be excused by a desire to avoid the constitutional issues in these cases. "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." *Heckler* v. *Mathews*, 465 U.S. 728, 741-742 (1984) (quotation marks omitted). This principle applies with special force here, where the constitutional challenge is clearly foreclosed by *Kleindienst* v. *Mandel*, *supra*. As both Judge Greene and Judge Bork recognized, there can be no doubt that the foreign policy concerns raised by the visa applicants' affiliations with

hostile foreign governments constitute "facially legitimate and bona fide reason[s]" (*Kleindienst,* 408 U.S. at 770) for their exclusions.

1.a. In refusing to resolve the "mere entry/presence" issue on the record before it, the court of appeals failed to "give effect to the unambiguously expressed intent of Congress" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. at 843 (footnote omitted)), as evidenced by the statutory language, structure, and history.

The concern of Subsection 27 is whether an alien's "activities" cause prejudice to the "public interest" or "endanger the welfare, safety or security of the United States." Since any alien admitted to this country must engage in some activity, "the distinction between an alien's activities and his presence" is, as the district court noted, "one without a difference" (App., *infra,* 72a-73a). Furthermore, as a matter of common sense, "it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest" (*id.* at 40a (Bork, J.).[9]

In sharp contrast, Subsection 29, 8 U.S.C. 1182(a)(29), requires denial of visas to aliens who "*after entry*" would engage in certain proscribed conduct, including "espionage, sabotage, public disorder, or * * * other activity subversive to the national security" (emphasis added). An interpretation that would also limit Subsection 27 to such activities would render it duplicative of Subsection 29—a

---

[9] Indeed, recent history amply demonstrates that the distinction between entry and activity is basically irrelevant to the statutory purpose. As the district court observed, "[t]he mere entry of the Shah [of Iran] into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Teheran and all that flowed from that episode" (App., *infra,* 73a).

result that would "offend[] the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect" (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (citations omitted)).

Moreover, as exhaustively set forth in Judge Bork's dissent (App., *infra*, 38a-42a), the legislative history on this issue is decisive. Subsection 27 was taken almost verbatim from Section 22 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1006.[10] The Senate Report accompanying the 1950 Act stated that existing law in this area—which Section 22 was intended to "*broaden*[]"—already excluded aliens "whose *entry* would be prejudicial to the public interest or would endanger the safety of the United States" (S. Rep. 2230, 81st Cong., 2d Sess. 5 (1950) (emphasis added)). Section 22, in turn, was itself derived from a bill enacted in 1941 (55 Stat. 252) and described in its accompanying Senate Report as having the purpose "of keeping out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety" (S. Rep. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added)). The chief sponsor of this bill explained that it "merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose *presence* in the United States will be inimical to the public interest" (87 Cong. Rec. 4757 (1941) (emphasis added; remarks of Senator Russell)).[11]

---

[10] Both the House and Senate reports stated that Subsection 27 merely "incorporate[s]" Section 22 of the Internal Security Act of 1950. S. Rep. 1137, 82d Cong., 2d Sess. 10 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 30, 49 (1952).

[11] Judge Bork's dissent cites three other examples from the legislative history which also demonstrate that Congress was concerned with an alien's presence, not just his likely activities after entry. App., *infra*, 40a-42a.

Against this legislative backdrop, the court of appeals nevertheless concluded that the legislative history "tugs in more than one direction" (App., *infra,* 17a). Yet, the only opposing pull cited by the court is a reference to prejudicial "activities" in the Conference Report accompanying the 1950 Act. See App., *infra,* 17a n.10, quoting H.R. Conf. Rep. 3112, 81st Cong., 2d Sess. 54 (1950). And, as explained by Judge Bork (App., *infra,* 42a), that discussion merely repeats verbatim the words of Section 22 and does not purport to explain what those words mean.

Finally, even if a common sense reading of the statute and its legislative history are not deemed to resolve the "mere entry/presence" issue, the court of appeals cited no evidence—and there is none—that suggests that the State Department's resolution of the issue is impermissible or unreasonable. As the agency charged with issuing visas under the Immigration Act, therefore, the State Department's resolution warrants judicial deference. *Chevron,* 467 U.S. at 842-845. Indeed, the demand for deference is heightened here because the question at issue implicates "the conduct of foreign relations" which is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (*Harisiades* v. *Shaughnessy,* 342 U.S. 580, 589 (19[illegible] (footnote omitted)). See *Regan* v. *Wald,* 468 U.S. 222, 242 (1984) (discussing the "classical deference to the political branches in matters of foreign policy"). The authority to exclude aliens is "inherent in sovereignty" (*Kleindienst* v. *Mandel,* 408 U.S. at 765 (quotation marks omitted)) and "intricately interwoven" with the conduct of foreign policy (*Harisiades* v. *Shaughnessy,* 342 U.S. at 588). This authority "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation" (*Knauff* v. *Shaughnessy,* 338 U.S. 537, 542

(1950) (citations omitted)). The courts should, therefore, "hesitate long before limiting or embarrassing such powers" (*MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915)).[12]

b. The court of appeals' approach to the McGovern Amendment is equally flawed. In order to prevent "evasion" of the Amendment, the court would require the government to process visa applicants under Subsection 28, rather than Subsection 27, unless the reason for exclusion is not only *in addition to*, but *independent of*, the fact of membership in a Subsection 28 organization. Yet the court cites nothing in the text or legislative history of the Amendment to justify this severe limitation on use of Subsection 27. The evidence, in fact, is just the opposite.

---

[12] Even if evidence of administrative practice were needed to decide the "mere entry/presence" issue, such evidence may be found without any remand. As discussed earlier (page 14), Judge Bork noted evidence already in the record supporting the government's position. Although the court of appeals relied on *Kent* v. *Dulles*, 357 U.S. 116 (1958), to find these examples inadequate (App., *infra*, 21a-22a), "[i]t would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in the record, the Executive lacks the authority to deal with the problem when it is encountered." *Haig* v. *Agee*, 453 U.S. 280, 303 (1981) (footnote omitted). Finally, the Office of Legal Counsel of the Department of Justice (OLC) has noted that in 1968 the State Department excluded certain Rhodesians because of concerns not with "any specific activities in which they would engage here, but [with] the serious adverse foreign policy consequences of allowing them to be present in violation of Security Council Resolution 253" (1 Op. Off. Legal Counsel 64, 70 (1977)). Relying, inter alia, on a discussion of legislative history that parallelled Judge Bork's (*id.* at 71-72), OLC concluded there that the exclusion had been "based on a reasonable administrative interpretation of [Subsection 27]" (*id.* at 71), and accordingly endorsed a similar exclusion in 1977. See also 8 U.S.C. 1103(a) (vesting authoritative executive interpretation of the Act in the Attorney General). The Rhodesian incidents illustrate the consistency—and utility—from Administration to Administration of the interpretation of Subsection 27.

The McGovern Amendment, enacted in 1977, simply provides that "the Secretary of State should * * * recommend that the Attorney General grant" a waiver of Subsection 28 excludibility in order to allow temporary admission of an alien who would otherwise be denied a visa "by reason of" membership in a Subsection 28 organization. As explained by Judge Bork, the purpose of the Amendment was to put an end to "the statutorily-required blanket exclusion of virtually all people who were or had been affiliated in some way with [a Subsection 28] organization" (App., *infra,* 48a-49a). The Amendment, however, is narrowly circumscribed. It applies only to applicants who are "otherwise admissible," and was amended in 1978 to make clear that it does not apply to "any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." As emphasized in the Conference Report discussing the Amendment, its provisions affect only those who are excludible "*solely* because of membership in or affiliation with a proscribed organization" (H.R. Conf. Rep. 95-537, 95th Cong., 1st Sess. 31 (1977) (emphasis added)).

The visa denials challenged in these cases clearly do not come within this narrow ambit. As noted by Judge Bork, the denials were based not on the aliens' memberships in proscribed organizations, but on their affiliations with foreign governments—governments whose relationships with the United States have been "marked with tension" (App., *infra,* 52a). Thus, as Under Secretary Eagleburger attested, Tomas Borge was excluded because he "intended to travel * * * *in his official capacity*" as one of the highest-ranking leaders of the Nicaraguan government (*id.* at 86a (emphasis in original)); Olga Finlay and Leonor Rodriguez Lezcano were excluded because they "intended to travel * * * not as private Cuban citizens, but rather as official representatives of the Cuban Government" (*id.* at 90a); and Nino Pasti was excluded because of his active

membership in the World Peace Council, an organization "controlled and financed by the USSR" (*id.* at 92a). And in each case the particularized foreign policy problems raised by their proposed visits were noted as well.[13]

The inapplicability of the McGovern Amendment to these cases is confirmed by the legislative history. In 1979, a provision was added to the Amendment to clarify that it does not apply to "representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state" (see 22 U.S.C. 2691(b)). A sponsor of this provision explained that it was designed to insure the exclusion of

> so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the State.

125 Cong. Rec. 8345 (1979) (remarks of Representative Solarz). As noted by Judge Bork (App., *infra,* 54a), while this provision specifically concerns only labor leaders, it reflects a broader understanding regarding the limits of the McGovern Amendment—namely, that representatives of foreign governments may be excluded notwithstanding their affiliation with Subsection 28 organizations.[14]

---

[13] That the particular circumstances were considered and the exclusions not reflexively made is further demonstrated by the fact that, in earlier circumstances, three of the four aliens involved here had been granted admission (see App., *infra,* 28a).

[14] Significantly, the legislative history apparently offers only two examples of the kind of persons to whom the McGovern Amendment would apply: Eurocommunist leaders and communist labor leaders. See S. Rep. 95-194, 95th Cong., 1st Sess. 13 (1977). Neither are government representatives.

The court of appeals' holding would create anomalous results. As noted by Judge Bork (App., *infra,* 56a), the panel's decision confers a *favored* entry status on those who are members of Subsection 28 organizations, and requires the Executive to ignore an established affiliation between a given Subsection 28 organization and a particular foreign government. In the *Cronin* v. *Shultz* case, for example, the court has refused to permit the government to conclude that Nino Pasti is an undisclosed agent of the Soviet Union based on his membership in the World Peace Council. Yet, as already noted, the State Department has determined that the World Peace Council is an instrumentality of the Soviet Union. See page 10, *supra.* As one Department document concluded, the World Peace Council has a "preponderance of Soviet and pro-Soviet personnel in [its] key * * * leadership and decision-making positions"; "the bulk of its expenses are met by the Soviet Union"; and it "operate[s] however Soviet foreign policy interests dictate" (Dep't of State, *World Peace Council: Instrument of Soviet Foreign Policy*, Foreign Affairs Note (April 1982), *reprinted in* C.A. App. A145, A147, A148). There is simply no basis for the court of appeals' assumption that Congress intended in the McGovern Amendment to have the Executive close its eyes to such an alter ego relationship.[15]

In any event, the Executive's view that the McGovern Amendment permits it to take this relationship into account, for purposes of Subsection 27, is plainly not unreasonable, and is entitled to deference under *Chevron* and the other authorities discussed above (pages 20-21). Indeed, the government's construction of the Amendment is rooted in established administrative practice under the Immigration Act. It is not infrequent that, as here, the

---

[15] The court of appeals apparently held that even its interpretation of the statutes was satisfied in the case of Tomas Borge (App., *infra,* 29a n.23).

facts of a case overlap two (or more) statutory grounds for exclusion or deportation, one of which contains a waiver provision such as the McGovern Amendment. This Court has held that the Executive's decision in such circumstances to proceed on the ground without the waiver is not—as the court of appeals suggests—an "evasion," but rather is fully consistent with statutory authority. See *Reid* v. *INS*, 420 U.S. 619 (1975); see also *Castro-Guerrero* v. *INS*, 515 F.2d 615 (5th Cir. 1975); *In re Diaz*, 15 I. & N. Dec. 488 (B.I.A. 1975).

2. It is vitally important that there be unambiguous recognition of the authority of the Department of State to exclude aliens whose presence or entry will impede its conduct of foreign affairs. As Under Secretary Eagleburger indicated (see pages 6-7, *supra*), Subsection 27 is used sparingly and, when it is used, it is because there are "significant diplomatic or foreign policy ramifications" at stake (C.A. App. A137). The Department of State should not be required to disregard the fact that the entry of a particular alien can have diplomatic repercussions, or the reality that some organizations are controlled by foreign governments.

Moreover, review by this Court is needed at the present stage of these cases because the court of appeals' decision manifests a troubling "process of judicial incursion into the United States' conduct of its foreign affairs" (App., *infra*, 64a (Bork, J., dissenting)). The ill effects of the decision will be felt both immediately and recurrently. The immediate effect, of course, will be an inappropriate and seriously intrusive remand, where the district court is to inquire into the circumstances of prior instances of Subsection 27's use, and into whether the United States has adequately demonstrated in this case that its exclusion of the aliens at issue was for reasons independent of, and not merely in addition to, their membership in organiza-

tions affiliated with foreign governments.[16] On the "mere entry/activity" issue, the panel demands that the government "come forward with further examples of the exercise or assertion of power to exclude under subsection (27) on the basis of presence alone," and requires that plaintiffs be given "sufficient discovery to contest those examples and provide counter-examples" (*id.* at 21a-22a (footnote omitted)). On the McGovern Amendment issue, the court requires further analysis of whether the visa applicants "have governmental affiliations independent of their membership in subsection (28) organizations" (see, *e.g.*, *id.* at 29a n.23).

Plaintiffs have, indeed, already taken the court's remand on the administrative practice issue as an invitation to discover the rationale underlying prior Subsection 27 exclusions. For example, in one discovery request, plaintiffs ask the Department of State to "describe the facts which formed the basis" for "every instance from January 1, 1970 to the present in which a visa was denied pursuant to" Subsection 27. Plaintiffs' First Set of Interrogatories and Document Requests, para. 12(a).[17] See also, *e.g.*, C.A. App. A180 (para. 4 of Declaration of Charles S. Sims (plaintiffs' co-counsel), discussing the wide discovery needed). Presumably, because the court of appeals' order allows plaintiffs to "contest" the examples produced by the government, plaintiffs will claim that they are entitled to cross-examine government officials regarding the reasons behind each example offered—a result fundamentally inconsistent with the Executive's exclusive discretion in this area. Cf. App., *infra*, 54a-55a n.5 (Bork, J.) ("requiring

[16] It deserves emphasis that these intrusive proceedings on remand are required here under the panel's decision even though the district court had ruled to the contrary and five out of nine participating appellate judges voted to grant rehearing en banc.

[17] This discovery request was originally served on December 30, 1983, and was revived following the court of appeals' remand order. See C.A. App. A66.

the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas").

On the McGovern Amendment issue, plaintiffs are likely to seize upon the court of appeals' remand order as authority to dispute any government determination that the visa applicants (independent of their organizational ties) are affiliated with foreign states. Indeed, the court of appeals posed just such a dispute in the case of Leonor Rodriguez Lezcano. The court stated that it did "not now comprehend any basis for claiming that [Lezcano has] governmental affiliations independent of [her] membership in subsection (28) organizations" (App., *infra,* 29a n.23). The court's conclusion, however, cannot be reconciled with Under Secretary Eagleburger's finding that "[t]he official, governmental nature of [both Lezcano's and Olga Finlay's] proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (C.A. App. A142). By reviewing—and indeed rejecting—the Under Secretary's finding, the court of appeals engaged in an exercise which could not be "further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs" (App., *infra,* 52a n.4 (Bork, J.)).[18]

In short, the court of appeals' decision was quite wrong, it will create substantial problems for the government's conduct of foreign policy, and will necessitate unseemly inquiry into its decisionmaking in this area.

---

[18] In *Kleindienst* v. *Mandel,* 408 U.S. at 770, this Court specifically instructed the courts not to "look behind" the "facially legitimate and bona fide reason[s]" offered by the Executive for exclusion of aliens. Such an inquiry would bring the judiciary into an area committed "exclusively [to] the political branches of government" (*id.* at 765 (quota-

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfuly submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ROGER CLEGG
Assistant to the Solicitor General
MICHAEL JAY SINGER
JOEL W. NOMKIN
Attorneys

ABRAHAM D. SOFAER
Legal Adviser
Department of State

OCTOBER 1986

---

tion marks omitted). Accord, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976); *Shaughnessy* v. *Mezei*, 345 U.S. at 210; *Harisiades* v. *Shaughnessy*, 342 U.S. at 589.

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673

JAMES ABOUREZK, ET AL., APPELLANTS

v.

RONALD WILSON REAGAN,
PRESIDENT OF THE UNITED STATES, ET AL.

No. 84-5681

CITY OF NEW YORK, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

No. 84-5708

BRUCE CRONIN, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-03739, 83-03741 and 83-03895)

Argued September 23, 1985

Decided March 11, 1986

Before: EDWARDS, GINSBURG, and BORK, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Dissenting Opinion filed by *Circuit Judge* BORK.

GINSBURG, *Circuit Judge*: This case concerns the scope of the authority Congress accorded to the Secretary of State under the Immigration and Nationality Act of 1952, § 182, 8 U.S.C. § 1182(a)(27) (1982), to deny non-immigrant visas to aliens who wish to visit this country in response to invitations from United States citizens and residents to attend meetings or address audiences here. The district court, granting the government's motion for summary judgment, held that the specific visa denials at issue were within the State Department's statutory and constitutional authority.

See Abourezk v. Reagan, 592 F.Supp. 880 (D.D.C. 1984). We conclude that the district court incorrectly analyzed the statutory construction issue, and that questions of material fact remain. Accordingly, we vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

We describe first the statutory complex and, next, the essential facts of the cases presented for review.

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1982) (Immigration Act or Act), delegates responsibility for regulating the entry of aliens jointly to the Attorney General, the Secretary of State, and United States consular officials abroad. The Secretary of State has the authority to revoke visas, as well as the general responsibility to supervise the issuance of visas by consular officers. *See id.* at § 1104; Brief for Appellees at 4. Section 1182(a) of the Act defines the categories of aliens that the government may exclude from this country. Some of these categories deal with the status of the alien, *see, e.g.*, § 1182(a)(28) (aliens who are members of Communist or anarchist organizations); others concern the alien's activities, *see, e.g.*, § 1182(a)(29) (aliens likely to engage in subversion or espionage); while still others involve the procedural requirements for entry, *see, e.g.*, § 1182(a)(20) (aliens without valid visas and passports).

Subsection (27) of section 1182(a), the provision centrally at issue in this case, directs the exclusion of an alien if the Attorney General has reason to believe that the alien "seek[s] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Pursuant to State Department policy, when a consular officer abroad receives a visa request from an individual he believes may be ineligible under subsection (27) the officer forwards the

request to the State Department where the appropriate officials consider it and render binding advice. *See* 22 C.F.R. § 41.130(c) (1985); Brief for the Appellees at 6-9.[1] If the alien is found to be within the subsection (27) classification, his exclusion is mandatory.

Subsection (28) of section 1182(a) also bears importantly on this case and was inadequately evaluated by the district court. This subsection authorizes the exclusion, *inter alia*, of aliens who are, or at any time have been, "members of . . . the Communist Party of the United States, . . . the Communist . . . party . . . of any foreign state, or . . . any . . . affiliate . . . of any such . . . party." 8 U.S.C. § 1182(a)(28)(C) (1982). Unlike subsection (27), subsection (28) does not require the Secretary of State to exclude any alien who meets the stated criteria. If the Secretary recommends a waiver of ineligibility, then, in the discretion of the Attorney General, the alien may be admitted. *See* 8 U.S.C. § 1182(d)(3)(A) (1982).

The McGovern Amendment, 22 U.S.C. § 2691 (1982), addresses the Secretary's implementation of this waiver provision. The Amendment calls upon the Secretary to recommend "the approval necessary for the issuance of a visa" to "any alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States," unless the Secretary certifies to the Congress that "the admission of such alien would be contrary to the security interests of the United States." *Id.* at § 2691(a).

---

[1] Routine name checks are ordinarily made in these cases through United States intelligence agencies. The State Department has acknowledged that "no recommendations were received from the Department of Justice or any of its components" regarding the visa requests involved in this litigation. Affidavit of Lawrence S. Eagleburger, *reprinted in* Joint Appendix at 140-41 (affidavit also acknowledges that information supporting visa denials for foreign policy reasons often includes "data and analyses from the United States law enforcement and intelligence communities").

This appeal involves three actions consolidated in the district court; the actions contest the denial under subsection (27) of four visa requests. In *Abourezk v. Reagan*, No. 84-5673, the plaintiffs are a diverse group of United States citizens—including members of Congress, university professors, journalists, and religious leaders—who had invited Tomas Borge, the Interior Minister of Nicaragua, to speak to them in this country. *See* Brief of Plaintiffs-Appellants at 9-11. The Nicaraguan government applied to the United States Embassy in Managua for a non-immigrant visa for Borge. After obtaining an advisory opinion from the State Department, the consular officer informed Borge, in late November 1983, that his visa request had been denied pursuant to section 1182(a)(27) of the Immigration Act. *See* Brief for the Appellees at 9-11.

The plaintiffs in *Cronin v. Shultz*, No. 84-5708, are principally groups interested in nuclear disarmament who had invited Nino Pasti to attend and speak at a rally in Boston. Pasti is a former member of the Italian Senate and former general in the Italian armed forces; he is now a peace activist. *See* Brief of Plaintiffs-Appellants at 8. Pasti is also a participant in the World Peace Council, an organization which the State Department believes to be controlled by the Soviet Communist Party. *See World Peace Council: Instrument of Soviet Foreign Policy*, FOREIGN AFFAIRS NOTE (Department of State, April 1982), *reprinted in* Joint Appendix at 144-48. The consular officer in Rome found Pasti ineligible to receive a visa under subsection (28). The officer therefore requested an advisory opinion from the State Department on the possibility of a waiver. In response, the Department informed the officer that Pasti was ineligible under subsection (27). The consular officer thereupon notified Pasti, in mid-October 1983, that his visa request had been denied. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 163-64.

In *City of New York v. Shultz*, No. 84-5681, the plaintiffs, the New York City Commission on the Status of Women and several women's studies programs at various universities, had extended speaking invitations to two Cuban women, Olga Finlay and Leonor Rodriguez Lezcano; these individuals have special expertise regarding the status of women and family law in Cuba. *See* Brief of Plaintiffs-Appellants at 13-14. According to the State Department, both women are members of the Federation of Cuban Women, an organization affiliated with the Communist Party of Cuba. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 164-65. Visa applications for the two women were conveyed by diplomatic note from the Government of Cuba. The consular officer in Havana forwarded the visa requests to the State Department and was advised that Finlay and Lezcano were ineligible under subsection (27). He notified them, in early October 1983, that their visa requests had been denied. *See* brief for the Appellees at 12-13[2]

---

[2] On October 4, 1985, acting pursuant to § 212(f) of the Immigration Act, 8 U.S.C. § 1182(f) (1982), President Reagan issued a proclamation suspending the entry into the United States of officers or employees of the Cuban government or the Cuban Communist Party. *See* Proclamation No. 5377, 50 Fed. Reg. 41329 (1985). If this Proclamation covers Finlay and Lezcano, the President's directive might constitute an independent intervening cause for future exclusions, and thus render the *City of New York* case moot. *See* Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The current record, however, is inadequate to enable us to determine, dispositively, whether the October 4, 1985, Proclamation would bar the entry of these women. *Compare* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 164-65 (stating that Finlay is an official of the Cuban Communist Party and a member of the National Committee of the Federation of Cuban Women and Lezcano, an official of the Federation of Cuban Women), *with* Affidavit of Olga Finlay, *reprinted in* Joint Appendix at 216 (stating that the affiant is not a member of the Cuban Communist Party and that the Federation of Cuban Women is not an instrumentality of the Cuban government or the Communist Party) *and* Affidavit of Leonor Rodriguez Lezcano, *reprinted in* Joint Appendix at 245 (same). We decline to decide this mootness issue on the scant

The plaintiffs filed suit in the district court requesting injunctive and declaratory relief. They argued that the State Department's exclusion of the aliens invited by plaintiffs to speak here exceeded the Department's statutory authority under subsection (27) and violated the plaintiffs' first amendment right to engage in dialogue with these foreign individuals. The district court granted the defendants' request for a stay of discovery pending their filing of a motion for summary judgment. *See Abourezk v. Reagan*, No. 83-3739 (D.D.C. Feb. 8, 1984) (order granting motion for extension of time and protective order staying discovery). After consideration of both the public documents and three classified affidavits submitted by the government for the court's *in camera* inspection, the district judge granted the defendants' motion for summary judgment. The court held that the government's action was within its statutory authority and survived the very limited constitutional scrutiny appropriate in a case concerning the admission or exclusion of aliens. *See Abourezk v. Reagan*, 592 F.Supp. 880 (D.D.C. 1984).

---

record before us. The same issues are raised by all three consolidated cases; a finding that *City of New York* has become moot would not relieve this court of the responsibility to decide those common issues. We therefore leave the question of the impact of the President's Proclamation to the district court on remand.

We note, however, that the issuance of this Proclamation provides support for one of the plaintiffs' arguments: even if the court were to find that subsection (27) cannot be applied to bar aliens whose mere entry would threaten United States foreign policy interests, the Executive would not be helpless in the face of such a threat. He may act pursuant to section 1182(f) to suspend or restrict "the entry of any aliens or any class of aliens" whose presence here he finds "would be detrimental to the best interests of the United States." The President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a). *See* Brief of Plaintiffs-Appellants at 40-42. Thus, we need not reject, avoid, or augment the formulation Congress adopted in subsection (27) in order to preserve the President's potency in this area. *Cf.* Dissent at 4-5.

II.

The government raises several preliminary objections to the adjudication of these claims. The State Department suggests that the district court lacked jurisdiction over the subject matter, that the plaintiffs have no right to contest the visa denials on statutory grounds, and that the case is moot. We find these contentions insubstantial.

The district court had subject matter competence in the case under both its general federal question jurisdiction, *see* 28 U.S.C. § 1331 (1982), and its specific jurisdiction over claims arising under the Immigration and Nationality Act, *see* 8 U.S.C. § 1329 (1982). Section 1329 states that "[t]he district courts . . . shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [of the Immigration Act]." Section 1182(a)(27) is part of the relevant subchapter. The courts have reasonably inferred from this broad grant of jurisdiction that "clear and convincing evidence" of a congressional intent to preclude judicial review is lacking. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (stating, as the general rule, presumption in favor of judicial review of final agency action, absent "clear and convincing evidence" of congressional intent to the contrary); *see, e.g., Karmali v. Immigration and Naturalization Service*, 707 F.2d 408, 409-10 (9th Cir. 1983) (interpreting § 1329 as grant of jurisdiction over Immigration Act claims); *Acosta v. Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977) (same).

We further note, as did the district court, *see Abourezk*, 592 F.Supp. at 883 n.10, the Supreme Court's disposition on the merits in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In that case, United States sponsors of a Belgian journalist objected to his exclusion under section 1182(a)(28). Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in

Mandel, it would have raised the issue on its own motion. *See, e.g., Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

The government also argues that the plaintiffs' statutory pleas may not be entertained; this argument blends objections to plaintiffs' standing and to their ability to state a claim for relief (cause of action). The Immigration Act, we agree, does not itself endow plaintiffs with a right of action.[3] But the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1982) (APA), which complements statutes controlling agency behavior, does. Section 702 of that Act, as explained by the Supreme Court in *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152-53 (1970), authorizes suit by persons who suffer "injury in fact" by reason of the challenged agency action and are "arguably within the zone of interests to be protected or regulated" under a relevant statute.[4]

Persons who are not materially affected by an agency's interpretation of the governing law may not successfully invoke the APA to achieve court review. *See, e.g., Capital Legal Foundatin v. Commodity Credit Corporation*, 711 F.2d 253, 259-60 (D.C. Cir. 1983). But the plaintiffs in

---

[3] The Immigration Act and related regulations provide explicitly for the participation of United States family members or employers in visa applications by certain aliens to whom they are connected. *See* 8 U.S.C. §§ 1151-1154 (1982) (immediate relative petitions); 8 C.F.R. § 204 (1985) (same); 8 C.F.R. § 212.8 (1985) (employer petitions). The plaintiffs in this case, however, are neither family members nor employers of the aliens in question. Therefore, they have no right to participate in the administrative process, and no attendant claims for relief, by virtue of these provisions. Nor does any other provision of the Immigration Act explicitly or implicitly authorize the claims in suit. *See* Cort v. Ash, 422 U.S. 66, 78 (1975).

[4] Section 702 affords a right or review to "[a] person suffering a legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1972).

this case are hardly strangers to the matter at issue. Unquestionably, they are "aggrieved" by the State Department's resort to section 1182(a)(27) to keep out people they have invited to engage in open discourse with them within the United States. *See* Brief for the Appellees at 20 ("Refusing visas to their alien invitees undoubtedly inhibits plaintiffs' rights to communicate with these individuals in face-to-face discussions on American soil."). The plaintiffs are substantively interested in, and adversely affected by, the Department's interpretation of subsection (27) as it coexists with subsection (28). They are, as the district court observed, at least arguably within the zone regulated by the statute. *See Abourezk*, 592 F.Supp. at 884 n.10.[5] They therefore have a cognizable stake in the construction of subsections (27) and (28), a practical interest adequate under section 702 of the APA to secure judicial review of their pleas regarding those provisions. *Cf. Capital Legal Foundation*, 711 F.2d at 259-60 & n.17.

Section 701 of the APA states that "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1982). As discussed above, the Immigration Act, far from precluding review, affirmatively provides for it. *See supra* at 8-9.[6] Furthermore, the statute does not

---

[5] The McGovern Amendment, *see supra* at 4-5, adds force to the position that plaintiffs suffered an injury that arguably falls within the zone of interests of the relevant law. *See infra* at 23-25.

[6] The government cites Block v. Community Nutrition Institute, 104 S. Ct. 2450, 2456 (1984), as support for the proposition that a history of judicial construction barring review and congressional acquiescence in that construction may override the general presumption favoring review. That proposition, while true, is irrelevant to this case. Unlike the statute in *Block*, the statute in this case explicitly provides for judicial review. *See Block*, 104 S. Ct. at 2457. To override the language of a statute, indirect evidence of congressional intent, such as acquiescence in judicial construction, must be strong. *Cf.*

commit to unguided agency discretion the decision to exclude an alien. The Supreme Court has recently interpreted the "committed to unfettered agency discretion" provision as applicable only "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985). Under this interpretation, the Immigration Act emphatically did not commit the decision to exclude an alien to standardless agency discretion; the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power. *See* 8 U.S.C. § 1182(a) (1982). The statutory language thus channels the Secretary of State's discretion and, under *Heckler v. Chaney*, the constraints Congress imposed are judicially enforceable.

In sum, the APA applies to the plaintiffs' challenges; that Act gives them a right of review extending to the statutory as well as the constitutional propriety of the

---

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intent to the contrary, [statutory] language must ordinarily be regarded as conclusive."). Moreover, the *Block* rule is inapplicable to this case because there exist no longstanding judicial practice of refusing to review claims like those raised here. *Cf. Block*, 104 S. Ct. at 2454-56 (holding that statute precludes judicial review of consumers' claims although it allows review of milk handlers' claims). This case involves claims by United States citizens rather than by aliens, unlike Karmali v. Immigration and Naturalization Service, 707 F.2d 408 (9th Cir. 1983); claims concerning the decisions of State Department officials rather than consular officers abroad, unlike Castaneda-Gonzalez v. Immigration and Naturalization Service, 564 F.2d 417, 428 n.25 (D.C. Cir. 1977); and statutory claims that are accompanied by constitutional ones. The defendants have not produced a single case, and the court is aware of none, in which this kind of claim was found to be outside the province of the federal courts. On the contrary, in a case specifically addressing this type of claim, the Third Circuit found that the APA applied and the court reviewed the merits of the claim. *See* Acosta v. Gaffney, 558 F.2d 1153, 1156 (3d Cir. 1977).

State Department's application of section 1182(a)(27) to exclude the aliens invited by plaintiffs to the United States as speakers and meeting participants. We add, finally, that in the special circumstances of this case, the court has an independent obligation to consider questions of statutory construction. We should so proceed in order to avoid a constitutional confrontation, if it is possible for us to stop short of that point. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This consideration strongly supports our attention to the plaintiffs' non-constitutional arguments. We should not reach "[the] constitutional question although properly presented by the record, if there is also present [a statutory construction] ground upon which the case may be disposed of." *Id.* In rejecting the government's demand that we confine review to the consistency of the State Department's actions with the Constitution, we thus observe the "cardinal principle" directing a court first to inquire "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Turning to the last of the government's threshold objections, we hold that the case is not moot. The government asserts that the State Department considers each visa application independently and that the present denials in no way bear on the results of any future application that the excluded aliens might make. *See* Brief for the Appellees at 26 n.23; Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 158. However, the reasons for the visa denials offered by the State Department and accepted by the district court indicate that the prospect of future denials of applications by these aliens is a genuine, and not merely a "theoretical[,] possibility." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The State Department's dominant reasons for the denials that sparked this litigation do not refer to a particular event in the world whose cessation might induce the government to grant visa requests from the aliens whom plaintiffs invited to speak. Instead, the Department cites the continuing status of these aliens as members of organizations or governments hostile to the United States.[7] The aliens, whose affiliations apparently have not changed, assert that their interest in entering the United States continues, and the plaintiffs have represented that they still wish to invite these aliens to speak in this country. *See* Brief of Plaintiffs-Appellants at 9 (Pasti), 13 (Borge), 17 (Finlay and Lezcano). In light of the reasons for the visa denials tendered by the government and relied upon by the district court, these allegations of continuing interest suffice to establish a genuine prospect that the plaintiffs will suffer the same injury in the future. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47 (1976).[8] We therefore reach the merits of the plaintiffs' claims.

---

[7] This characterization of the government's reasons may be gleaned from publicly available documents. *See* Affidavit of Lawrence S. Eagleburger, *reprinted in* Joint Appendix at 141-43 (noting the membership or affiliation of each excluded alien); Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 162-65 (same); *see also Abourezk*, 592 F.Supp. at 888 (giving a general description of the reasons stated in the classified affidavits). This court has also examined the reasons offered in the *in camera* affidavits; they do not decrease our concern over the inaccuracy of the State Department's public representations that these visa denials do not in any way forecast the results of a future application.

[8] In addition, the plaintiffs assert that they are suffering a present and continuing harm in the form of the "chill" that the challenged State Department policy places on their first amendment interest in hearing foreign speakers. United States audiences are reluctant to extend invitations to foreign speakers, plaintiffs urge, for fear that the aliens may be subjected to the embarrassment of being denied a visa

III.

The plaintiffs raise three issues of statutory interpretation. They argue, first, that subsection (27) does not authorize exclusion on the basis of foreign policy concerns, as opposed to issues of "public interest or . . . [national] welfare, safety, or security . . . ." 8 U.S.C. § 1182(a)(27) (1982). Second, the plaintiffs contend that subsection (27) allows exclusion only if it appears that the alien's *activities* in the United States would endanger the public welfare and not if his or her mere *presence or entry* might do so. And, third, the plaintiffs suggest that the government's interpretation of subsection (27) violates the statute because it renders subsection (28) superfluous and undermines the restrictions Congress has placed on the Executive's use of subsection (28). *See* McGovern Amendment, 22 U.S.C. § 2691 (1982).

Our approach to statutory interpretation is informed by the guidelines the Supreme Court announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984). According to *Chevron*, a court must first examine the statutory provision in question to determine whether Congress had a specific intent with respect to the issue at hand. *See id.* at 2781. This examination should begin with the language of the statute, *see Consumer Product Safety Commission v. GTE Sylvania,*

---

on the ground that they pose a danger to the public welfare. Similarly, the alien invitees may be unwilling to accept invitations when the price is to submit to such "ideological scrutiny." *See* Brief of Amici Curiae American Association of University Professors et al. at 12-13 (presenting examples of chilling effect). In the first amendment area, such "chill" has long been recognized by the courts as a harm independent from the actual application of the challenged statute. *See* Thornhill v. Alabama, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion").

Inc., 447 U.S. 102, 108 (1980), but the court may also inspect legislative history and past administrative practice for any light these sources may shed on congressional intent. *See, e.g., Chevron*, 104 S.Ct. at 2791-92; *Rettig v. Pension Benefit Guaranty Corporation*, 744 F.2d 133, 144-50 (D.C. Cir. 1984). If the court finds that Congress had a specific intent with respect to the issue, the court stops there and enforces that intent regardless of the agency's interpretation. *See Chevron*, 104 S.Ct. at 2781-82 & n.9. If, however, the court finds that Congress had no specific intent, the agency's interpretation should be accorded great deference and invalidated only if it is not a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . ." *Chevron*, 104 S.Ct. at 2783 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

Following these guidelines, we conclude, in agreement with the government and the district court, *see Abourezk*, 592 F.Supp. at 885-86, that Congress intended foreign policy concerns to rank among the national interests whose protection would justify exclusion of an alien under subsection (27). The broad language of (27) evinces no intent to restrict the kinds of governmental concerns that would qualify; the subsection speaks of "public interest[,] . . . welfare, safety, or security" and places no limitation on these encompassing terms. Only an isolationist view patently inconsistent with the reality of our late twentieth century world could account for a belief that the "public interest" and the "national welfare" were not dependent, in part, on the effective execution of our foreign policy. The court surely should not adopt on its own initiative such a counter-intuitive interpretation of expansive statutory language, and the plaintiffs have identified nothing in the legislative history or administrative practice to suggest that Congress intended to exclude foreign policy concerns from

consideration under subsection (27). Because the State Department's interpretation appears fully consistent with congressional intent, we need take this inquiry no further.

The plaintiffs also contend that subsection (27) explicitly authorizes exclusion based only on "activities" in which the alien may be expected to "engage" and not on mere entry or presence. The district court decided this issue for the government. *See Abourezk*, 592 F.Supp. at 884-85. We conclude that it did so on an inadequate record. We therefore remand for a fuller airing of the activity/mere entry question.

The language of the statute, as the Dissent acknowledges, supports the plaintiffs' interpretation on this issue. Dissent at 9. The provision does not say "persons whose presence in this country would be prejudicial to the interests of the United States are barred from entry." Rather, subsection (27) makes ineligible for a visa those aliens who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial" to United States interests. The specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone could justify exclusion. A familiar cannon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of its meaningless. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1984). This basic guide and the plain thrust of the language of subsection (27), we emphasize, weigh heavily against the government's reading.

The terms Congress employed in other subsections on exclusion are also consistent with plaintiffs' interpretation. Section 1182(a) sets out thirty-three separate categories of excludable aliens; this enumeration demonstrates that Congress could and did clearly distinguish status-based categories from conduct-based categories. *See supra* at 3. Congress' undoubted ability to draft categories based only

on status, when that is the legislature's intention, strengthens the inference that the "words "to engage in activities" contained in subsection (27) were not put there inadvertently.

The legislative history on this issue, however, is not a prop upon which plaintiffs can rely. It is terse and tugs in more than one direction. The language of section 1182(a)(27) of the 1952 Immigration Act was taken almost verbatim from section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (repealed 1952). The Senate Reports on section 22 seem to assume that both existing law and the proposed section allowed exclusion when the very entry of the alien would be prejudicial to the public interest.[9] The Conference Committee Report, on the other hand, implies that existing law and section 22 authorize exclusion only on the basis of activities.[10]

---

[9] The Senate Reports both state that

> [u]nder existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened this class of excludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

S. REP. No. 2230, 81st Cong., 2d Sess. 5 (1950); S. REP. No. 2369, 81st Cong., 2d Sess. 10 (1950).

[10] The Conference Committee Report states that the relevant section

> provides for the exclusion from the United States of aliens seeking to enter for the purpose of engaging in activities which are prejudicial to the public interest and dangerous to the welfare or safety of the United States, whether or not such aliens seek to enter the United States solely, principally, or incidentally for such purpose. Existing law merely provides for the exclusion of aliens if the Attorney General knows or has reason to believe that such aliens are seeking to enter the United States to engage in activities which would endanger the public safety of the United States.

H.R. REP. No. 3112, 81st Cong., 2d Sess. 54 (1950).

Given the inconclusive state of the legislative history,[11] evidence of congressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling. Information about such acquiescence, or the absence of it, would rank as a significant indicator of the legislature's will. *See Zemel v. Rusk*, 381 U.S. 1, 8-12 (1965).[12] Unfortunately, evidence on this

---

[11] The Dissent finds strongest support for the State Department's reading in the legislative history of a bill enacted in 1941 containing a prescription from which subsection (27) was later derived. Dissent at 7-9. We do not find the history of the earlier formulation as clear as the Dissent contends it is. On the contrary, one searches all the legislative history in vain for an illustration homing in on the question at issue.

Thus, one can only speculate on what the legislative report participants had in mind when they made their seemingly interchangeable references to "entry" and "activities." Conceivably, as the Dissent presumes, they believed "activity" embraced the "act" of entry. Or, they may have understood "entry" to implicate activities likely to be pursued upon admission. At least as plausibly, their word choices were casual and inadvertent, not motivated or informed by the precise consideration at issue in the instant cases.

In sum, we think it plainly wrong as a general matter, and in this case in particular, to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports. Hirschey v. FERC, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

[12] There is no possibility of congressional acquiescence in a longstanding *judicial* construction. The parties have uncovered only two court cases, in addition to this one, concerning the scope of subsection (27). In El-Werfalli v. Smith, 547 F.Supp. 152 (S.D.N.Y. 1982), the court held that a Libyan student seeking to enter the United States in order to study airplane maintenance was properly excluded under subsection (27). While such study does not rise to the level of subversive activity, it clearly constitutes an "activity" exceeding mere

point was thin when the district court determined to accept the State Department's interpretation, for that court had stayed discovery pending the government's motion to dismiss. *See Abourezk v. Reagan*, No. 83-3739 (D.D.C. Feb. 8, 1984). The only evidence of administrative practice now in the record consists of conflicting assertions in the affidavits of past and present State Department officials and a sparse collection of illustrations. *Compare* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 159-60 (present Deputy Assistant Secretary of State), *with* Affidavit of Leonard C. Meeker, *reprinted in* Joint Appendix at 252 (former Legal Adviser to the Department of State).

The illustrations—advanced by the State Department as indicative of an administrative practice of excluding aliens under subsection (27) based on entry or presence alone—include descriptions of three actual visa denials and four examples listed in the State Department Manual. While these illustrations provide some support for the government's position, they are inadequate to enable a court to determine reliably the nature of the general administrative practice under subsection (27).

The Manual offers the following examples of aliens whose visa applications might properly be denied under (27): an alien who might engage in conspiratorial activity against the United State while in the country; an alien who is known to be a member of a terrorist organization; an alien who is associated with a criminal organization; and an alien official who engaged in physical brutality while in power or was associated with a regime that did so. *See* Brief of Plaintiffs-Appellants at 37 (citing FOREIGN

---

presence. In Allende v. Shultz, No. 83-3984-C (D. Mass. April 2, 1985), the court did not reach this precise issue because it held the government's reasons for exclusion inadequate on other grounds. *See infra* note 16. Thus, judicial opinions provide no grounding for the State Department's interpretation.

AFFAIRS MANUAL, Pt. II, § 41.91(a)(27), *reprinted in* 6 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 32-214.18 (1985)). Although the first three examples may be explained in terms of the aliens' probable activity in the United States, the last example, the government argues, embodies the State Department's longstanding view that exclusion under subsection (27) is appropriate when the mere entry of the alien would prejudice foreign policy objectives. In that example, the government is concerned, not about the possibility that the official might engage in physical brutality while in the United States, but about the impact of the very admission of such a person on our foreign policy interests. *See* Brief for the Appellees at 56 n.42. This fourth example in the Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone; such an assertion of authority may warrant the implication of an executive policy, even if the policy is only infrequently applied, and may contribute to a showing of congressional acquiescence in that policy. *See Haig v. Agee,* 453 U.S. 280, 303 (1981).

The State Department also offers three instances of actual visa denials that were allegedly based on entry rather than activity and were reported to various members of Congress and committees. In two of the cases the reasons for denial included references to the alien's anticipated activities in the United States. *See* Second Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 306, 308.[13] In the third case, however, the State Department appears to have

---

[13] In 1959, 1961, and 1962, the Stater Department refused a visa to Thomas W.I. Liao, the self-appointed leader of a movement to establish an independent Formosa. The Department found that there was "a clear incompatibility between Mr. Liao's projected activities while in the United States and our foreign policy objectives with respect to Taiwan and the Republic of China." Second Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 306. In July of 1964,

applied the fourth example in the Manual: in that case, former Nazi SS officer Otto Skorzeny was denied a visa under subsection (27) for foreign policy reasons. *See id.* at 306. Thus, there seems to be at least one instance, of which Congress was apprised, in which the State Department actually applied the interpretation of subsection (27) that the government presses in this litigation.

This meager evidence does not demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence. *See Kent v. Dulles*, 357 U.S. 116, 128 (1958) (holding that "scattered rulings . . . not consistently of one pattern" are an insufficient basis on which to impute congressional intent). The examples cited by the State Department, in conjunction with the inconclusive legislative history, however, do cast some doubt on the plaintiffs' interpretation, an interpretation that otherwise seems indicated by the language of the statute. In order to weigh the relative persuasiveness of the two interpretations, the district court needed more information.[14] It should have asked the government to come forward with further examples of the

---

the Department also denied a visa to Mme. Ngo Dinh Nhu, the sister-in-law of the late Prime Minister of Vietnam, on the ground that "her expected activities would only serve as a demoralizing influence on the people and Government of Vietnam," which the United States was committed to support. *Id.* at 308.

[14] The Dissent suggests, and we acknowledge, that such information may be difficult to find or inconclusive. *See* Dissent at 12-13. Given this record, however, one can only offer guesses, bets, or suspicions about the existence or weight of such evidence. We do not think it proper to prejudge this issue on a barren record and thereby short-circuit the inquiry into congressional intent. The district court, upon fuller consideration, may find the evidence of congressional acquiescence insufficient in quantity or quality, but that judgment, we think, should be made *after* an examination of the available evidence, not before.

exercise or assertion of power to exclude under subsection (27) on the basis of presence alone; and, in fairness, it should have allowed the plaintiffs sufficient discovery to contest those examples and provide counter-examples.[15]

Without thus developing a more substantial record, the district court could not make a secure finding concerning the nature of the administrative practice under subsection (27). And without such a finding, given the inconclusive state of the legislative history and the strength of the plaintiffs' textual argument, the district court's decision in favor of the government's interpretation was premature. We therefore set aside the district court's holding on this issue and remand for the fuller proceedings appropriate prior to resolution of this question of statutory interpretation.

The plaintiffs also contend that the government's interpretation of subsection (27) violates the statute because it effectively swallows up subsection (28) and thereby nullifies the restrictions placed by the McGovern Amendment on the use of the latter subsection. We find this argument persuasive. The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28).

The McGovern Amendment calls upon the Secretary of State to recommend a waiver of ineligibility, and thereby open the way for admission of an alien who belongs to a subsection (28) organization, unless the Secretary certifies to the Congress that admission of the alien would "be contrary to the security interests of the United States. . . ." 22 U.S.C. § 2691(a) (1982). The district judge in this case found that prejudice to foreign policy did not qualify as a "security interest" within the meaning of the McGovern

---

[15] We note in this regard that the government has named a few persons to whom visas were denied, allegedly under the authority of subsection (27), and has not suggested that any privilege would shield a further listing of cases in point.

Amendment. *See Abourezk*, 592 F.Supp. at 855; *accord Allende v. Shultz*, No. 83-3984-C, slip op. at 9 n.2 (D. Mass. April 2, 1985). The State Department itself appears to have reached the same conclusion. *See* Brief of Plaintiffs-Appellants, app. B at 2 (letter from Alvin Paul Drischler, Acting Assistant Secretary of State, to George Bush, President of the United States Senate (Oct. 18, 1983)) ("The result [of the McGovern Amendment] has been that the Secretary of State is effectively precluded from acting in such cases on the basis of legitimate foreign policy factors and considerations.").

If the government could use subsection (27) to exclude aliens whose entry might threaten our foreign policy objectives simply because of their membership in Communist organizations, then subsection (28) would be made superfluous and the congressional will expressed in the McGovern Amendment will be nullified. Conversely, the restrictions on subsection (28) must not be read in a fashion that would rob subsection (27) of its independent scope and meaning. To preserve the significance of both sections, and the congressional intent that guided their adoption, the two sections must not be homogenized or treated as interchangeable parts. *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (holding that courts must interpret statutes in such a way as to give effect to all of their provisions).[16]

---

[16] The district court in Allende v. Shultz, No. 83-3984-C (D. Mass. April 2, 1985), adopted this view. Finding it "unnecessary. . . to scrutinize the parameters of subsection (27)," the court recognized that traditional principles of statutory construction required that "[a]mong the classes of aliens to which subsection (27) does *not* apply are those which fall squarely within the ambit of one of the other thirty-two statutory categories . . . ." *Id.* at 8. "Because subsection (28) directly encompasses Mrs. Allende's membership in [two communist organizations]," the court held that "her affiliation with these

The government argues that it has distinguished the two sections by using (27) only when it has a reason for exclusion in addition to the alien's membership in an organization listed in (28). *See* Transcript of Proceedings at 38-40, *Abourezk v. Reagan*, No. 84-5673 (D.C. Cir. Sept. 23, 1985). This standard, however, is inadequate to prevent subsection (27) from overwhelming and obliterating subsection (28) and the McGovern Amendment. A reason that is *in addition to* the fact of membership but not *independent of* that fact provides an insufficient bulwark against the possibility of Executive evasion of the will of Congress as expressed in the McGovern Amendment.

For example, the broadest generalization about the character or activities of members of a group would be a reason in addition to the bare fact that a particular alien belonged to that group. But to exclude an alien based on the perceived bent or proclivities of members of a subsection (28) organization would contravene the core purpose of the McGovernment Amendment. The Amendment was intended to implement the United States' promise under the Helsinki Accords[17] to promote the free flow of people and ideas across national borders. *See* 22 U.S.C. § 2691(a) (1982); S. REP. No. 194, 95th Cong., 1st Sess. 13 (1977). The Amendment fullfills that commitment by assuring that a would-be speaker is not condemned by association with a subsection (28) organization[18] if he is "otherwise

---

organizations is not, in itself, a 'facially legitimate and bona fide' reason for her exclusion within the meaning of subsection (27)." *Id.* at 9 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

[17] Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), *reprinted in* 14 I.L.M. 1292 (1975).

[18] Nothing in our analysis inhibits the State Department from using a group affiliation to deny visas to members of terrorist groups, *see* MANUAL, *supra* at 20, or organized crime syndicates, *see id.* The McGovern Amendment applies only to the organizations specifically

admissible." 22 U.S.C. § 2691(a) (1982). A visa denial based on a generalization about the members of a subsection (28) group surely qualifies as the brand of guilt by association Congress sought to check. No reason particular to this alien or this moment in time distinguishes such a denial; the denial is appropriate for all members at all times because it is simply a condemnation of the group as a whole.[19]

We hold that when an alien is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) only if the reason for the threat to the "public interest[,] . . . welfare, safety, or security" is *independent of* the fact of membership in or affiliation with the proscribed organization. Only if such an independent reason exists will the use of subsection (27) leave intact the congressionally mandated restrictions on subsection (28).[20]

---

proscribed by the Act and, of the thirty-three categories of excludable aliens, only subsection (28) specifically addresses membership in or affiliation with an organization as the basis for exclusion. The organizations proscribed in (28) are Communist and anarchist groups. *See* 8 U.S.C. § 1182(a)(28) (1982).

[19] The government has offered no evidence of congressional acquiescence in an administrative practice that would alter our view that the legislature did not cast subsections (27) and (28) as interchangeable parts. Indeed, when asked at oral argument, government counsel was unable to identify any case other than this one and *Allende*, No. 83-3984-C (D. Mass. April 2, 1985), in which subsection (27) was used to deny a visa to an alien to whom subsection (28) applied. *See* Transcript of Proceedings at 41-42, *Abourezk v. Reagan*, No. 84-5673 (D.C. Cir. Sept. 23, 1985).

[20] The Dissent argues that the McGovern Amendment retains its vitality even without the interpretation we embrace today. Without the McGovern Amendment, subsection (28) would pose a presumptive bar to the entry of any member of a Communist organization. The Dissent points out that the State Department has not explicitly revived that policy of general exclusion, it has simply determined to exclude

The Dissent finds sufficient reason, separate from the applicants' membership in proscribed organizations, for upholding the government's action under subsection (27). This reason consists of alleged affiliations of the visa applicants with particular governments hostile to the United States (the governments of Nicaragua, the Soviet Union, and Cuba). *See* Dissent at 17-19. We do not reject affiliation with a particular foreign government as beyond the

---

members of those subsection (28) organizations it believes to be affiliated with certain foreign governments. *See* Dissent at 22. The Dissent makes the practical prediction that not all subsection (28) organizations will be so affiliated, and therefore finds that the McGovern Amendment is left intact.

The Dissent's analysis, we believe, is flawed in this respect: the issue turns not on practical predictions but on the possesion of power. If the State Department's current policy entails the power to achieve precisely the same results as under subsection (28) before the McGovern Amendment, then it is small virtue that those results now can be achieved without explicitly reviving a policy of ideological exclusion. Under the Dissent's interpretation of the statute, the State Department may exclude someone simply by pointing to her membership in a subsection (28) organization; the additional, conclusory assertion that the organization has certain affiliations provides no safeguard because the assertion may be offered in every case and cannot be questioned or reviewed by any court. *See* Dissent at 17 n.4. A statement thus walled off from any effective challenge scarcely qualifies as a reason.

The State Department therefore remains armed with the power to exclude all members of subsection (28) organizations for foreign policy reasons. That is precisely the power the McGovern Amendment was designed to revoke. We conclude that the State Department's approach does not leave the McGovern Amendment intact and that the more stringent standard we adopt is necessary to effectuate congressional intent.

This standard will also leave intact the independent scope of subsection (27). For example, all four of the illustrative applications of (27) in the State Department's MANUAL, *see supra* at 20, would still be appropriate under our view of the respective provinces of the two clauses.

pale of subsection (27). However, if the alleged government affiliation is presumed *because of* the applicant's membership or participation in a subsection (28) organization, we would not count that presumption as independent of the organizational tie. In other words, if all members of a proscribed organization were automatically branded "affiliates' of a certain government, that branding would be no more independent of the fact of membership than the generalization about the character or activities of group members to which we earlier referred. *See supra* at 24-25.[21] On the other hand, if the State Department pinpoints the alien's official post or action as an offical repre-

---

[21] The Dissent suggests that this interpretation creates a "favored entry status" for communists: members of organizations not included in subsection (28) can be excluded on foreign policy grounds under subsection (27) simply because their membership links them to a hostile foreign government, but members of subsection (28) groups cannot. *See* Dissent at 23. The McGovern Amendment was, however, a response to the historically *disfavored* position of subsection (28) organizations. The imaginary Council in the Dissent's hypothetical never suffered from the explicit ideological exclusion embodied in subsection (28) or the extreme and general public hostility that motivated Congress to include that subsection in the Act in 1952. *See generally* THE MEANING OF MCCARTHYISM (E. Latham ed. 1965) (a collection of essays on the causes and effects of McCarthyism).

Congress could reasonably have believed that these special disabilities warranted special precautions where subsection (28) organizations were concerned. If a member of a subsection (28) group poses a threat to national security, she stands on the same footing as a similarly threatening member of any other type of group. But where no such threat is present, Congress determined that a close look is in order, in fidelity with the Helsinki Accords, *see supra* at note 17, before the United States excludes members of subsection (28) organizations. This closer look insures that the longstanding practice of excluding such persons under subsection (28)—which codified an historically demonstrated animosity—does not taint exclusions after the McGovern Amendment's repudiation of that animosity.

sentative of a hostile government as *the* reason for the exclusion under subsection (27) on foreign policy grounds, then the "independent of" organizational membership standard would be met.[22]

The State Department, however, has so far obscured its position. It mentioned both subsection (28) organizational affiliations and connections between the visa applicants and certain foreign governments. *See, e.g.*, Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 162-65. But at the same time, the Department volunteered that earlier in the same year (1983), during Borge's incumbency as Interior Minister of Nicaragua, a visa application for his travel to the United States had been approved. *Id.* at 166. Similarly, the Department represented that both Finlay and Pasti "have previously received [non-immigrant visas] and travelled to the United States." *Id.* In short, the Department has never squarely advanced as the rationale for exclusion the applicants' government ties rather than their subsection (28) organization member-

---

[22] The Dissent describes our "independent reason" safeguard as ineffective, entirely vulnerable to the power the Attorney General holds: he may deny a visa under subsection (28) despite the Secretary's recommendation of entry. *See* Dissent at 24-25. Foreign policy, however, is the Secretary's specialty; it is not the Attorney General's customary field. Our decision, it is true, in no way prevents the Attorney General from venturing into the foreign policy domain. But we expect, as we assume Congress did when it adopted the McGovern Amendment, that instances in which the Attorney General rejects action in the foreign policy realm that the Secretary recommends will be extraordinary. In sum, Congress apparently designed the Amendment with the traditional division of responsibility between the two executive departments in full view. Such divisions of responsiblity, and the closely kept balance of powers that results from them, have long been regarded as an effective check on the disingenuity of individual public officials. *See* The Federalist No. 51, at 344-45 (J. Madison) (P. Ford ed. 1898). So long as the traditional allocation of responsibility between the two departments is maintained, Congress' action and our endeavor to assure its validity should not be exercises in futility.

ship.[23] Instead, it has taken an "either/or" stance. *See Abourezk*, 592 F.Supp. at 888 (*in camera* affidavits show that applicants were denied entry "because of their personal status as officials of governments *or* organizations which are hostile to the United States") (emphasis supplied).

If we were to deem it sufficient, as the Dissent does, for the State Department so to rest on pleas in the alternative, we would shirk our obligation to enforce the congressional direction, which the Dissent acknowledges, *see* Dissent at 14, to pay genuine heed to the McGovern Amendment. The Department, as the agency charged by Congress with

---

[23] Perhaps the State Department has shied away from this rationale in part because it is problematic whether all of these aliens have independent affiliations with hostile governments. Tomas Borge clearly has such a connection: he holds a cabinet post in the Nicaraguan government. But some of the other speakers in this case lack such an unambiguous connection to a hostile foreign government. For example, if Nino Pasti has any governmental affiliation, it is to the Italian government, in which he served as both a Senator and a General in the armed forces. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 163. Of course, no one—neither the State Department nor the Dissent—argues that Pasti was, or should be, excluded because of a connection to the government of Italy. Instead, the suggestion is that Pasti's affiliation with the *Soviet* government warrants his exclusion. This alleged affiliation consists, however, solely and simply in Pasti's participation in the World Peace Council, an organization clearly covered by subsection (28) and the McGovern Amendment. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 163. Similarly, Leonor Rodriguez Lezcano, so far as the current record indicates, has never held public office in Cuba or actively represented the government of that country. Her affiliation with the Cuban government apparently arises, according to the State Department, because of her participation in the Federation of Cuban Women, a subsection (28) organization. *See id.* at 164-65. Thus, we do not now comprehend any basis for claiming that these two visa applicants have governmental affiliations independent of their membership in subsection (28) organizations.

the administration of the statute, of course would retain authority initially to frame criteria for determining when a sufficiently independent reason exists to warrant invocation of subsection (27). The Department's criteria must be clear enough to allow the courts to fulfill their responsibility to insure that the executive authority respects congressional intent, but the precise contours of the "independence inquiry" should be left, in the first instance, to the sound and expert judgment of the State Department. We therefore remand the three consolidated cases so that both the district court and the government may reevaluate these visa denials without the statutory misinterpretation that casts doubt on their previous analyses.[24]

IV.

We note our grave concern about the district court's heavy reliance upon *in camera ex parte* evidence when it granted the defendants' motion for summary judgment. That court evaluated the public documentation as "entirely conclusory" and inadequate; it thereupon turned to the classified affidavits and asserted that it found in them information justifying its final disposition. *See Abourezk*, 592 F.Supp. at 886-87. We caution the district court, in the further proceedings this opinion requires, to make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests.

It is hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the

---

[24] Because we find that questions remain concerning the State Department's compliance with the statutory requirements, we do not reach the plaintiffs' constitutional claims. We therefore express no opinion about the section of the district court opinion devoted to the analysis of those claims.

reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions. *See In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981).

Exceptions to the main rule are both few and tightly contained. Nost notably, inspection of materials by a judge isolated in chambers may occur when a party seeks *to prevent use* of the materials in the litigation. When one side, seeking to block consideration of relevant matter, asserts an evidentiary privilege, the court may inspect the evidence *in camera* and alone for the limited purpose of determining whether the asserted privilege is genuinely applicable. *See id.* If the court finds that the claimed privilege does not apply, then the other side must be given access to the information; if the court's finding is that the privilege does apply, then the court may not rely upon the information in reaching its judgment. *See Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 104 S.Ct. 1316 (1984). In either case, no party will be faced—as were the plaintiffs in this case—with a decision against him based on evidence he was never permitted to see and to rebut.

Only in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute. Our one case in point, *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984), involved the state secrets privilege, a privilege not invoked in this case. The government pressed acute national security concerns in *Molerio*, and we recognized a large risk that an unjust result would eventuate if the case proceeded without the privileged material. *See id.* at 825. While we allowed court recourse to the confidential information in *Molerio*, we based that allowance upon proper invocation of the privilege; a demonstration of compelling national security concerns;

and public disclosure by the government, prior to any *in camera* examination, of as much of the material as it could divulge without compromising the privilege. In addition, the plaintiff in *Molerio* had been accorded considerable discovery of non-privileged materials. *See id.* at 819; *see also Ellsburg*, 709 F.2d at 63-64.

We mention finally a third class of cases in which *in camera* inspection may occur: exceptions to the main rule specified by statute. The prime current example is the Freedom of Information Act, 5 U.S.C. § 552 (1982). Even in administering such legislation, however, we have been vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings. *See, e.g., Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (requiring the government to create a public index listing privileged documents and providing explanations of the claim of privilege). No statutory scheme permitting closeted inspection of evidence is implicated in this case.

In sum, we expect the district court, on remand, to be mindful of the tight boundaries set in *Molerio*, and of the overriding importance of assuring plaintiffs' receipt of the most complete information and explanation permissible.

V.

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Congress, in the legislation at issue, has specified categories of excludable aliens and has qualified the application of one of those categories through the passage of the McGovern Amendment. The State Department must

respect the restrains Congress imposed. The district court's conclusion that the congressionally prescribed boundaries had not been transgressed was insufficiently grounded; the court proceeded to judgment without the exploration of administrative practice necessary to an informed decision and it did not adequately advert to the relationship between two statutory provisions. We therefore vacate the district court's judgment. We remand the three consolidated cases for reexamination of the visa denials in question to insure that the challenged government action is within the statutory and constitutional authority of the State Department.

Judgment vacated and cases remanded for proceedings consistent with this opinion.

BORK, *Circuit Judge, dissenting*: In these consolidated cases, we review the denial of non-immigrant visas to four applicants who wish to enter the United States – Thomas Borge, Nino Pasti, Olga Finlay, and Leonor Rodriguez Lezcano. The plaintiffs are American citizens who wish to meet with these applicants if they are permitted to enter the United States.

Each of these applications was denied pursuant to 8 U.S.C. § 1182(a)(27) (1982), which requires exclusion of aliens who "the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Thomas Borge is the Interior Minister of Nicaragua and a member of the National Directorate of the Sandinista Front for National Liberation. Nino Pasti, formerly a member of the Italian Senate, is an active participant in the World Peace Council, which the State Department characterizes as an instrumentality of the Soviet Union. Olga Finlay and Leonor Lezcano are officials of the Federation of Cuban Women, which, according to the State Department, is controlled by the Cuban Communist Party. Finlay has served as the Cuban representative to the United Nations Commission on the Status of Women. According to the American official who received their applications, both women were the bearers of Cuban diplomatic passports, and their visa applications were conveyed via diplomatic note from the government of Cuba. Affidavit of Louis P. Goelz, Joint Appendix ("J.A.") at 153-67. the United States government determined that the entry of these applicants would be prejudicial to the public interest, and declined to grant them visas.

Plaintiffs challenge these decisions—and the judgment of the district court upholding their legality—on both statutory and constitutional grounds. They assert that the Executive acted without statutory authority on three grounds: because subsection (27) does not authorize exclusion simply on the basis of foreign policy (as opposed to national security) concerns; because subsection (27) does not authorize the exclusion of an applicant when it is his mere entry, rather than the specific activities in which he intends to engage, that will be prejudicial to the public interest; and because the government's interpretation will effectively nullify 22 U.S.C. § 2691 (1982) (the McGovern Amendment). The majority opinion rejects the first argument and remands on the basis of its analysis of the second and third. The majority therefore does not need to address the plaintiffs' other set of claims—that such authority, if in fact authorized by statute, is unconstitutional both as a violation of the first amendment and as inconsistent with fundamental principles of separation of powers.

While I agree that we have jurisdiction to reach the statutory issues presented,[1] I disagree with the analysis

---

[1] Defendants have raised before us, as they did below, the question of whether plaintiffs have standing to mount a *statutory* challenge to these exclusions. They concede that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to meet with excluded aliens have standing to raise a constitutional (first amendment) claim. Kleindienst v. Mandel, 408 U.S. 753 (1972). They argue, however, that the associational rights sufficient to confer first amendment standing in this case provide no standing to contend that the government lacks statutory authority for the exclusions.

The two sets of claims, however, cannot so easily be broken apart. A court faced with this constitutional challenge must first construe the statutes to determine whether they authorize what was done and, if so, whether they pass constitutional muster. It would be extraordinary if the court found that the statutes did not authorize the exclusions, thus the first amendment did not invalidate the statutes, but, since the challenge and standing were based on the first amendment, the court was without power to rule the unauthorized exclusions illegal. This

used by the majority to resolve them, and dissent from the holding of today's decision. Because I conclude that the statute permits what the government has done, I go on to reach the constitutional challenge and conclude that it fails.

I.

The initial issue in this case is one of statutory construction. We are governed, as the majority notes, by the principles articulated by the Supreme Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). The Court in *Chevron* made clear that a court "must give effect to the unambiguously expressed intent of Congress" if such intent can be gleaned from the statutory language and legislative history. *Id.* at 2781-82. If, however, the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. The Court went on to note that to approve an administrative construction a court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or

---

would be witty, no doubt, but it smacks too much of the hairsplitting that brought the old rules of common law pleading into disrepute.

When the actions of the executive branch are challenged as violative of constitutional rights, the issue of the scope and source of executive authority necessarily becomes part of the analysis in which a court is required to engage. For example, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court invalidated President Truman's seizure of a steel mill because it was authorized neither by an explicit grant of power from Congress nor by any inherent Executive power. Had President Truman relied not on his inherent authority but rather upon a statute which did not in fact confer upon him the necessary power, his act would have been invalidated nonetheless. That is the situation the majority thinks may exist here. Whether the majority is right or wrong on the statutory issue, there can be no question that appellants have standing to raise it.

even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 2782 n.11. Therefore, where the traditional tools of statutory analysis lead to confused or contradictory interpretations, a reasonable reading of the statute given by the agency charged with its execution must be upheld.

This principle of deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs. Such authority is fundamentally executive in nature. When a court undertakes to review such decisions, it is "dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). The Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that "the right [to exclude] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Therefore, in its delegations of power in the area of foreign relations, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas," *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965), and "[p]ractically every volume of the United States Statutes contains one or more acts . . . of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Export Corp.*,

299 U.S. at 324. The Immigration and Nationality Act is one such statute; it mandates exclusion in thirty-two separate categories, while preserving in subsection (27), in the broadest of terms, the authority of the Executive to order additional ones.

I have discussed these basic principles at the outset because I do not believe the majority opinion gives them appropriate weight, either when it requires the government to come forward with further examples of prior administrative construction, or when it adopts an overly restrictive interpretation of the McGovern Amendment in order to prevent the Executive from "evading" the terms of that provision.

II.

The majority remands this case to the district court so that more information may be gathered to resolve conflicting claims over prior administrative interpretations of subsection (27). I believe the remand, and the further inquiry, to be unnecessary. The issue around which these claims revolve—whether subsection (27) authorizes denial of a nonimmigrant visa when only the applicant's entry or presence, as opposed to his specific activities, are deemed prejudicial to the public interest—is one that can be fairly resolved on the basis of the legislative history and the record now before us, and I see little to be gained through the taking of further evidence. The legislative reports accompanying subsection (27) and earlier enactments—the present provision traces its lineage to laws passed in 1950 and 1941—made clear that when the entry, presence, or admission of an applicant would be prejudicial to the public interest, that applicant would be ineligible to receive a visa.

When Congress enacts a new statute that repeats the language contained in an older statute, there is a heavy presumption that Congress meant the same thing in each,

particularly when the new statute is in part a codification of existing law. *See Doe* v. *diGenova*, 779 F.2d 74, 82 (D.C. Cir. 1985); *Stribling* v. *United States*, 419 F.2d 1350, 1352-53 (8th Cir. 1969). *Accord* 2A N. Singer, *Sutherland Statutory Construction* § 53.03, at 554 (Sands 4th ed. 1984). That is the situation with respect to subsection (27).

The Senate and House Reports accompanying the current law, the Immigration and Nationality Act of 1952, indicate that section 1182(a)(27)-(29) incorporated the parallel provisions of the Internal Security Act of 1950, ch. 1024, 64 Stat. 987, along with certain revisions. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 30 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952). Section 1182(a)(27) was derived from section 22 of the Internal Security Act of 1950, which had excluded from admission:

> [a]liens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States . . . .

64 Stat. 1006 (amending Act of Oct. 16, 1918, 40 Stat. 1012, 8 U.S.C. § 137 (1946). The Immigration and Nationality Act retained that language in its entirety, revising it only by changing "welfare or safety" to "welfare, safety, or security."

As the majority notes, the Senate Report accompanying the Internal Security Act described this paragraph as:

> an admixture of existing law and the new provisions of the bill. Under existing law, among the exciudable aliens are certain aliens who seek to enter the United States whose *entry* would be prejudicial to the public interest or would endanger the safety of the United States. The committee has *broadened* this class of ex-

> cludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

S. Rep. No. 2369, 81st Cong., 2d Sess. 10 (1950) (emphasis added); *accord* S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950). The Internal Security Act, therefore, was explicitly described as including and broadening existing provisions prohibiting prejudicial entry. This is not a counterintuitive interpretation; it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest.

The Immigration and Nationality Act incorporated this language, and this interpretation as well. In one of its few specific references to subsection (27), the accompanying Senate Report made mention of:

> an alien [who] appears to be excludable under paragraph (27), (28), or (29) of section 212(a) as an alien whose *entry* would endanger the public safety or security of the United States or as an alien who is a member of one of the subversive classes of excludables. . . .

S. Rep. No. 1137, *supra*, at 27 (emphasis added).

This was the interpretation given this language by a prior Congress as well. The language of subsection (27) had its origin in a bill enacted in 1941, which provided:

> [t]hat whenever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States.

55 Stat. 252. In a number of respects, this was a more narrowly written provision than the one later enacted as 8

U.S.C. § 1182(a)(27) (1982). First, it did not grant the Attorney General authority to make these determinations; he was not so authorized until an Act of Congress passed in 1948, ch. 338, 62 Stat. 268. Second, the 1941 language referred only to activities endangering the "public safety," while the Immigration and Nationality Act included those "prejudicial to the public interest" and dangerous to the country's "welfare" or "security" as well. Third, the bill enacted in 1941 referred simply to aliens seeking to enter the country "for the purpose of engaging in activities" thought to merit exclusion, while the Immigration and Nationality Act refers to those aliens who seek to enter "solely, principally, or incidentally to engage in [such] activities."

Despite the seemingly more restrictive statutory definition of "activities," the legislative history makes clear that the Congress that enacted the 1941 legislation saw the bill as excluding those whose *entry* or *presence* would endanger the public safety. According to the Senate Report:

> The purpose of the legislation is to provide means not now afforded by law of keeping out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety.

S. Rep. No. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added). That Senate Report was only two pages long and relied for its explanation of the bill primarily upon two pieces of correspondence describing the legislation—one from the Attorney General, and one from the Acting Secretary of State. The letter from the Attorney General described the bill as authorizing.

> the refusal of visas to aliens whose *entry* into the United States would endanger the public safety.

Id. (emphasis added). The letter from the State Department described the bill as authorizing.

> the refusal of visas to aliens whose *admission* into the United States would endanger the public safety.

Id. at 2 (emphasis added). Similarly, the chief sponsor of the bill, Senator Russell, explained on the Senate floor that the bill.

> purports to confer a power on the members of the Consular Service abroad which I already thought they had. It merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose *presence* in the United States will be inimical to the public interest.

87 Cong. Rec. 4757 (1941) (emphasis added).

It seems evident, therefore, that in making reference to "activities" in this context, Congress has done so with the understanding that the term encompasses entry and presence as well. Standing against these consistent references to "entry" is the Conference Report cited by the majority, maj. op. at 18 n.10, which refers to prejudicial "activities." H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950). That part of the Conference Report, however, simply recites, virtually word for word, the language of the statute itself. It provides no additional explanation of elaboration, and does not seek to describe what Congress understood those words to mean. It is the language of the statute itself, which uses the term "activities," that provides the most persuasive support for the plaintiffs' position.

Had we before us nothing but the language of the statute, without any legislative history, I might be inclined to adopt the construction proposed by the plaintiffs. The question would by no means, however, be free from doubt, for it is not at all clear—from the language alone—whether presence within this country can itself be

deemed an "activity." In any event, as Justice Harlan has written, "[t]he decisions of [the Supreme] Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.' " *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962) (quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946)) (other citations omitted). When Congress has repeated again and again that it enacted these words with an understanding that they required the exclusion of aliens whose entry would be harmful, I think it necessary to conclude that the sharp dichotomy between "entry" and "activities" that is urged upon us is incompatible with congressional intent. And to the extent that this question is regarded as close, I find controlling both the teaching of *Chevron* and the deference Congress and the courts have traditionally accorded Executive determinations in matters pertaining to foreign relations.

This remand is therefore unnecessary. The majority finds it "conceivable" that the repeated references to entry in the legislative history were meant to authorize what they purported to authorize. Maj. op. at 18 n.11. I think it more than conceivable. But even if this repeated usage was "casual and inadvertent, not motivated or informed by the precise consideration at issue in the instant cases," *id.*, we are still left with *Chevron*, which held that when Congress "has not directly addressed the precise question at issue," a court must defer to a reasonable administrative interpretation. 104 S.Ct. at 2782. I find it difficult to understand how an interpretation offered half a dozen times by Congress in the legislative history can possibly be unreasonable when adopted by officials in the executive branch. The majority may find another interpretation more plausible, but that is not the standard we are charged to apply.

The majority has not in fact determined that the interpretation was unreasonable, but believes that evidence of possible congressional acquiescence is necessary before a proper conclusion can be reached one way or the other.[2]

---

[2] As the majority notes, there is already some evidence in the record of prior administrative interpretation supporting the government's position. The State Department Manual lists four "type cases [that] are illustrative, but . . . by no means exclusive, of those involving a determination of the applicability" of subsection (27). One of the four type cases consists of

> [a]liens who are notorious for allegedly engaging in excesses, including physical brutality while in political power in their native land, or who were prominently identified with any former regime which did so.

Foreign Affairs Manual, pt. II, § 41.91(a)(27), *reprinted in* 6 C. Gordon & H. Rosenfeld, *Immigration Law and Procedure* 32-214.18 (1985). The concern reflected here has nothing to do with the specific activities in which these aliens are expected to engage while in the United States, but is rather an expression of disapproval of brutal governments; hence the exclusion of those "identified" with such regimes.

The majority also discusses three specific past exclusions under subsection (27) cited by the government and concludes that only one of the three was in fact an exclusion on the basis of prejudicial entry. Maj. op. at 21 & n.13. I think it only fair to note, however, that the government did not cite these examples for the purpose of supporting its argument that prejudicial entry alone is sufficient to merit exclusion. They were invoked instead to support the wholly separate point, accepted by the majority, that damage to foreign policy interests has been considered "prejudicial to the public interest." *See* Brief for Appellees at 54.

Finally, the majority makes reference to the conflicting affidavits submitted by the parties. Maj. op. at 19. The affidavits of Lawrence S. Eagleburger, at the time the Under Secretary of State for Political Affairs, and Lewis Goelz, Deputy Assistant Secretary of State for Visa Services, support the government's position. J.A. at 138, 159-60. Plaintiffs have submitted the affidavit of Leonard Meeker, former Legal Adviser to the Department of State, which contradicts the position taken in the government's affidavits. J.A. at 250-52. Mr. Meeker's affidavit, however, offers an interpretation of subsection

As I have just noted, congressional acquiescence is unnecessary if the department's interpretation is reasonable. But the majority's position seems to me incorrect for a second reason. Addressing the issue of congressional acquiescence in *Haig* v. *Agee*, 453 U.S. 280 (1981), the Supreme Court noted that

> it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. Although a pattern of

---

(27) that the majority has in part explicitly rejected—specifically, that subsection (27) only authorizes denial of visas to "aliens whose anticipated activities in the United States would create dangers to this country of a gravity comparable to espionage and sabotage," such as "murder, mob violence or terrorism." J.A. at 251-52; *contra* maj. op. at 15-16. Such an interpretation is belied by the three specific examples of past exclusions decribed in the majority opinion, and would render subsection (27) entirely duplicative of subsection (29), which requires the exclusion of all aliens "with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security . . . ." An interpretation of subsection (27) that would render it superfluous, and therefore meaningless, is suspect. *See* 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (Sands 4th ed. 1984). The fact that the majority has rejected the construction of "prejudicial to the public interest" that the Meeker affidavit claims was adopted by the executive branch in previous years does not, of course, mean that the majority cannot give any weight at all to the account in the affidavit of prior interpretations of "activities," since it was only the latter issue that the majority felt unable to resolve without resort to prior administrative interpretations. Nevertheless, it does cast some doubt on the validity and usefulness of the Meeker affidavit, and the extent to which it can be said to undermine the government's position sufficiently to make a remand necessary.

> actual enforcement is one indicator of Executive policy, it suffices that the Executive has "openly asserted" the power at isuse.

Id. at 303 (citation omitted). That open assertion is present, in this instance, in the State Department Manual, *see supra* note 2.[3] Further evidence of congressional acquiescence may be hard to come by. Congress has not recodified or reenacted the immigration statute since 1952. The district court is therefore expected to infer acquiescence simply from evidence of passive congressional awareness of an existing policy, without the affirmative indication of congressional approval implied by a reenactment of the same statute without relevant revisions. Moreover, government records relating to visa requests are required by law to be kept confidential. 8 U.S.C. § 1202(f) (1982). While records of three incidents of exclusions, cited by the majority, have become available—prompted by "Congressional inquiry or other public interest," Second Affidavit of Louis P. Goelz at 2, J.A. at 305—the overall policy is one of avoiding disclosure. Since Congress cannot acquiesce, or refuse to acquiesce, in a practice about which it is not generally informed, it is unlikely that the remand will produce any evidence more dispositive than that which is currently before us.

Even if the plaintiffs were able to demonstrate that their more narrow interpretation had governed Executive policy in prior years, they would still have to prove that it was an

---

[3] The majority cites Kent v. Dulles, 357 U.S. 116, 128 (1958), in characterizing the evidence before us as evidence of "scattered rulings . . . not consistently of one pattern." In *Kent* v. *Dulles,* however, the Court justified that higher burden of proof placed on the government by reference to the difficult and important constitutional issues implicated by the government's policy. The plaintiffs before us, however, have not presented a single plausible constitutional argument. *See supra* Part IV.

interpretation in which Congress can be said to have acquiesced. This may be difficult. Subsection (27) allows the President broad discretion in deciding which admissions would be prejudicial. If the President in the past has not exercised the full measure of the authority he now claims to possess, the mere absence of an affirmative response by Congress proves very little. Acquiescence is more easily inferred when the Executive may have in the past *over*-reached, because that is the situation to which an objecting Congress is more likely to react, and in which inaction is more revealing. *See, e.g., Haig* v. *Agee*; *Dames & More* v. *Regan*, 453 U.S. 654 (1981).

Since I believe that a fair construction of the statute supports the reasonableness of the government's interpretation, and since I cannot see how the case could conceivably be resolved against the government if it failed to come forward with the "further examples" requested by the majority, maj. op. at 22, I dissent from the decision to remand.

III.

I have concerns as well with the majority's effort to distinguish subsections (27) and (28), and with its discussion of the McGovern Amendment. I agree that any interpretation of subsection (27) that renders subsection (28) superfluous and thereby nullifies the McGovern Amendment would be incorrect, and I agree as well that subsection (28) and therefore the McGovern Amendment are applicable when the mere fact of membership in an organization proscribed under subsection (28) is the only basis for exclusion. However, the majority has fashioned a rule that subsection (27) may be used only when the reason for exclusion is *independent of* the fact of membership. The McGovern Amendment does not require such a rule.

In order to appreciate the purpose behind the McGovern Amendment, it is necessary to understand the state of the law at the time of its enactment. Subsection

(28) then rendered anyone who was, or had been, a member of any anarchist, totalitarian, or communist organization ineligible for a visa, with the exception of those whose membership had been involuntary, those who had joined at a very young age, those who had joined in order to obtain food rations or other essentials, and those who had terminated their membership and actively opposed the doctrines of the organization for at least five years prior to the date of their application. Applicants who fell within one of these exceptions were not *per se* eligible, but could be admitted only if the consular official and the Attorney General determined that their admission would be "in the public interest." 8 U.S.C. § 1182(a)(28)(I) (1976). In addition to the blanket exclusion required by subsection (28), subsection (27) existed as it does today, and provided for additional exclusions.

An alien denied a non-immigrant visa under any but three of the thirty-three subsections of 8 U.S.C. § 1182(a) (1976) could, notwithstanding his initial ineligibility, be admitted into the country "in the discretion of the Attorney General" if he approved a recommendation to that effect by the Secretary of State or a consular officer. 8 U.S.C. § 1182(d)(3)(A) (1976). Subsection (28) was one of the thirty subsections to which this waiver provision was applicable, and it was this provision that the McGovern Amendment modified. The McGovern Amendment, as originally enacted, stated that "within 30 days of receiving an application for a non-immigrant visa by alien who is excludable . . . by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible," the Secretary of State should recommend to the Attorney General that the application be granted, unless national security concerns are implicated.

The McGovern Amendment was an expression of congressional disapproval of the statutorily-required blanket exclusion of virtually all people who were or had been

affiliated in some way with an organization of one of the named varieties. Prior to the enactment of the McGovern Amendment, the millions of people around the world who fell into one of the categories denominated by subsection (28) were automatically excluded, unless the Secretary of State and the Attorney General affirmatively decided otherwise. Individual decisions had to be made with respect to every applicant who would have been admitted into the country *but for* the fact that he belonged at some time to a named organization. The Senate Report accompanying the McGovern Amendment explained that it would have the effect of "open[ing] the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make the politically difficult individual decisions which might imply a change in overall U.S. policy toward Communism." S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977). *Accord* S. Rep. No. 842, 95th Cong., 2d Sess. 16-17 (1978) (describing visits by West European Communist leaders and Communist labor leaders as the "principal result" of the McGovern Amendment).

The McGovern Amendment applies only to Applicants who are "otherwise admissible to the United States," and was amended in 1978 to include the following statement:

> Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludable for reasons other than membership in or affiliation with a proscribed organization.

22 U.S.C. § 2691(a) (1982). As the 1977 Conference Report explained, the McGovern Amendment applies only to those excludable "*solely* because of membership in or affiliation with a proscribed organization." H.R. Rep. No. 537, 95th Cong., 1st Sess. 31 (1977) (emphasis added). In order to elaborate upon the meaning of phrases like "solely because of membership" and "otherwise admissible,"

and to prevent "evasion" of the McGovern Amendment, the majority has formulated a rule that requires the government to process visa applicants under subsection (28), rather than (27), unless the reason for exclusion is not merely *in addition to,* but *independent of,* the fact of membership. As elaborated upon in the majority opinion, this requirement apparently was met when the Borge application was denied, but calls into question the denials in the other cases. Because I believe that the McGovern Amendment clearly does not apply to any of the visa requests before us today, I feel compelled to explain my understanding of what the McGovern Amendment does and does not do, and why a requirement that the reason be independent of membership will deny the Executive authority that Congress intended it to have.

Subsection (28) was enacted by a Congress that wished to exclude as a general rule, all members of whatever level of participation in any communist, anarchist, or totalitarian organization. The presumption that all members of such groups, for that reason alone, ought to be excluded was rejected by the Congress that enacted the McGovern Amendment. But Thomas Borge, to take one of the cases before us, was not excluded because of membership in a communist party in Nicaragua. Borge is that country's Interior Minister and is one of the highest-ranking members of the Nicaraguan Cabinet. It was his *governmental* affiliation that triggered exclusion. Affidavit of Lawrence S. Eagleburger, J.A. at 141. Former Senator Pasti is an active participant in the World Peace Council, which the State Department believes to be an instrumentality of the Soviet government. *Id.* at 141-42. Olga Finlay and Leonor Rodriguez Lezcano are members of the Federation of Cuban Women which, according to the State Department, is controlled by the Cuban Communist Party. Their visa applications were submitted by the Cuban government, *id.* at 142, and Finlay has

represented the Cuban government on a United Nations Commission. Declaration of Ogla Finlay, J.A. at 215.[4]

---

[4] In cases of this sort, plaintiffs may dispute the United States' view that visa applicants are participants in or affiliated with certain foreign governments. In this case, for example, Finlay and Lezcano, in affidavits filed below, deny that the Federation of Cuban Women is controlled by either the Cuban government or the Cuban Communist Party, J.A. at 216, 245, and the plaintiffs "deny that Mr. Nino Pasti participates in the World Peace Council as an 'instrumentality' of the Soviet government," and state that they "have no information bearing on the accuracy of this characterization for the Council itself." Plaintiffs' Statement of Genuine Issues at 4, J.A. at 175. If the majority means to suggest that these disputes are open to judicial resolution, *see* maj. op. at 6-7 n.2, then it is making an assumption I find extremely dubious, First, such questions, while containing elements of fact, are largely interpretive. Determining the point at which one institution's influence over another becomes "control" requires a series of policy decisions courts are unequipped, and unauthorized, to make. Second, even if such determinations *were* within our power and competence, they would require information that might well be too sensitive for the Executive to submit, even *in camera.* We do not possess, and cannot demand, all of the same detailed and confidential information at the disposal of the Executive. Indeed, even if we had that information, we would not have the surrounding knowledge of such things as the methods of communist operations and linkages to place the information in context. Courts cannot replicate the expertise of the Department of State and proceed to take over the Department's functions. Third, the actual issuance of judicial pronouncements on the questions of who is or is not an instrument of a foreign government, and the process of examination that would proceed them, carry the potential of significant disruption of our country's foreign policy.

In order to decide whether the Federation of Cuban Women, for example, is in fact "controlled" by the Cuban government, a court would presumably have to define the degree of influence necessary to constitute "control" and proceed to examine, through witnesses, documentary evidence, and public affidavits, if possible, the conflicting factual assertions and interpretive characterizations made by the private parties and the United States government. The court would wish to examine formal titles and organization charts, but would need in addition to analyze the more informal ways in which the Federation made its decisions and conducted its activities, to see if there existed a

According to the Eagleburger affidavit, "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban Diplomatic Passports and by the submission of their applications through diplomatic channels." Affidavit of Lawrence S. Eagleburger at 8, J.A. at 142. Unless governments can themselves qualify as "organizations" under subsection (28), affiliations with specific governments, even when through a subsection (28) organization, constitute grounds for exclusion separate from those found within subsection (28) itself. Relationships between our government and the governments of Nicaragua, the Soviet Union, and Cuba have been marked with tension. The diffuculties that characterize these relationships are not simply a function of the sort of generalized suspicion of communism that animated the near-absolute ban of subsection (28). I do not know whether the complexities of these government-to-government relationships ought properly to be characterized as "independent of," or merely "additional to," the adherence of these govern-

---

veil that needed piercing. Indeed, the foreign governments themselves might wish to participate, and submit their own affidavits disavowing any connection with the visa applicants. Under the Act of State doctrine, we might well be precluded from reaching a decision contrary to the assertions contained in such affidavits, for we would be "inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). A United States court ought not lightly undertake a role in which it must issue a public pronouncement that either the United States or a foreign government is untruthful about an issue of inter-governmental relations. Few exercises could be further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs. The United States' characterizations of the relationships between the visa applicants and foreign governments in this case cannot, therefore, be open to legal challenge.

ments to a communist ideology. I do know that nothing in the sparse legislative history surrounding passage of the McGovern Amendment warrants an extreme interpretation barring such factors from consideration. Such a reading is certainly not required in order to ensure that subsections (27) and (28) each retain an independent meaning. The best construction appears to be that subsection (28) applies when the sole ground for exclusion is membership in an organization of the sort described. When that membership raises addititional concerns, as it does when it involves a connection to a government that implicates American foreign policy, subsection (27) comes into play.

The distinction is real and important between a generalized congressional distrust of communist ideology and organizations and a specific Executive concern over admitting a particular person associated with a foreign government that the Executive considers in some respects adversarial to ours. The McGovern Amendment applies only to the former. That is suggested by the only two concrete examples of its application given in the legislative history—Eurocommunist leaders and Communist labor leaders. In fact, the State Department authorization bill passed in 1979 amended the McGovern Amendment to make clear that it did not apply to "representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state." 22 U.S.C. § 2691(b) (1982). As Congressman Solarz explained to his colleagues on the House floor:

> While [the McGovern Amendment] was very well intentioned, designed as it were to facilitate entry into the United States by a broad range of individuals, in practice it has resulted in a situation where a number of people have been admitted here who most of us, I think, do not believe should have been admitted to our country.

> I have in mind, for example, . . . the so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the State.

125 Cong. Rec. 8345 (1979). While the specific provision added dealt only with labor leaders, the understanding it reflected—that the status of applications by representatives of foreign governments were not to be affected by the McGovern Amendment, whatever the applicants' additional organizational affiliations might be—has broader application.

The majority in fact concedes that governmental affiliations qualify as legitimate grounds for the denial of a visa under subsection (27), and it is these affiliations that the defendants have consistently cited as the basis for denial in these cases. *See* Statement of Material Facts as to Which There is No Genuine Dispute at 5, 7, 9, J.A. at 128, 130, 132; Affidavit of Lawrence S. Eagleburger at 3, 7, 8, 9, J.A. at 137, 141, 142, 143.[5] The majority's quarrel with

---

[5] I do not understand the reliance placed by the majority on the fact that previous visa requests by the same applicants have been granted, maj. op. at 29, for that in no way calls into question the legitimacy of the government's position. The defendants have not specified before us the reasons for granting the earlier requests because they were not at issue in these cases. In any event, we certainly ought not to require the government to come into court and justify each past visa decision in order to prove a pattern of integrity. That would involve courts in judging the reasonableness of this aspect of United States foreign policy, a task for which they are wholly unsuited. It is for the Executive, and not for courts, to determine when the relevant factors have changed, or when it is appropriate to change tactics even though circumstances remain the same. Additionally, requiring the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas. The denial of a

the defendants' position, therefore, is that the State Department has not advanced this rationale of government ties *independently* of organizational ties, but instead, in some of these cases, has found the nexus between the applicant's membership in subsection (28) organizations. Thus, even if officials of a foreign government acting in that capacity create an organization of the sort described in subsection (28), fund it with government revenues, choose its staff, and decide upon its activities and policies, members of that organization are nevertheless not sufficiently affiliated with the parent government to justify their exclusion under subsection (27). It would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country. In the former case, party membership carries an *additional,* though not an *independent,* status. The requirement of an additional status—governmental affiliation—is quite enough to give meaning to the McGovern Amendment and to distinguish subsection (27) from subsection (28).

The majority's elevation of form over substance has no basis in the language or the legislative history of the McGovern Amendment, which are silent on the question of where subsection (28) leaves off and subsection (27) begins. The majority infers its rule of independence from a

---

visa is not a declaration of war; it may be a reflection of any of a number of specific and unreported developments affecting relations between nations. Even in relationships long characterized by hostility, there are thaws and chills, conciliatory gestures and confrontational ones. The government is certainly not required to choose between denying all visa requests coming from one country or individual or none at all, and is certainly free to determine that reducing access without eliminating it entirely constitutes an appropriate and measured policy.

structural analysis; it seeks to ensure that (28) is not completely subsumed within (27). But unless the majority believes that every subsection (28) organization is an instrumentality of a foreign government whose representatives the United States will wish to exclude, subsection (28) remains intact and independent without the majority's rule. Without the McGovern Amendment, there would be a statutory policy to exclude all members of subsection (28) organizations; that policy has *not* been revived as the rationale of the decision we review. The McGovern Amendment is, therefore, in no danger of becoming a nullity.

The majority holds that regardless of any connection that might exist between a *particular* proscribed organization and a *particular* foreign government, the McGovern Amendment prohibits using the associational ties as a basis for exclusion. The McGovern Amendment therefore becomes peculiarly selective in its prohibition of guilt by association. If the World Peace Council were *not* a subsection (28) organization, and came to be viewed as an instrumentality of, for example, the Libyan government instead of the Soviet government, the McGovern Amendment would not apply and members of the Council could be excluded. While Congress' attitude toward the exclusion of Communists may have changed somewhat between 1952 and 1977, it is doubtful that the McGovern Amendment was meant to confer upon communists a favored entry status. But that is precisely what the majority opinion does. I believe the more logical reading of the McGovern Amendment is the more narrow one—that the McGovern Amendment sought to end the statutory policy of excluding *all* members of subsection (28) organizations automatically, when there was nothing more than the fact of membership as a basis. I do not believe the provision was meant to insulate members of those organiza-

tions—and only members of those organizations—from whatever additional grounds for exclusion their membership raised.

The majority's rule of independence is thus neither supported by the language or the legislative history of the McGovern Amendment nor reasonably inferable from the structure of the statutory scheme, and its application will lead to illogical and inconsistent results. This rule was apparently fashioned in part as a means of preventing the Executive from "evading" the limitations of the McGovern Amendment. I wish to note why, even were the majority's construction to be otherwise correct, the safeguard created may be toothless. First, it is at least an open question whether the terms of the McGovern Amendment are in fact mandatory. The State Department has apparently interpreted them to be, *see* Drischler letter (cited in maj. op. at 23), and there is legislative history to support this interpretation. *See* S. Rep. No. 842, 95th Cong., 2d Sess. 16 (1978) (one year after passage, describing McGovern Amendment as "mandating" favorable recommendation from Secretary of State). The provision itself, however, only declares that the Secretary "should" make a favorable recommendation, 22 U.S.C. §2691(a) (1982). In 1978, the Senate voted in favor of amending the provision to substitute the word "shall" for "should," but that revision was dropped at conference and the original language was retained. H.R. Rep. No. 1535, 95th Cong., 2d Sess. 44 (1978). In 1979, during a discussion on the House floor over proposed modifications of the McGovern Amendment, Congressman Solarz stated:

> Right now, under the McGovern amendment, the Secretary of State is obligated to recommend the waiver that they be admitted, unless he believes that admitting them would constitute a threat to the national security of the United States; and if he feels that they will not constitute a threat to the national security of the United States, he is obligated to recommend the waiver.

125 Cong. Rec. 8347 (1979). Congressman Fascell, Chairman of the Subcommittee on International Operations, responded:

> I just want to say that I agree with the explanation made by the gentleman from New York (Mr. Solarz), with one correction: The present language of the law, this is, the McGovern amendment, is not mandatory.
>
> Other than that, Mr. Chairman, I would agree with everything which the gentleman from New York has said.

Id. A bit later, Congressman Solarz indicated his agreement:

> If the gentleman will yield, I want to underline what the subcommittee chairman said, that the McGovern language is not mandatory. The Conferees went to a good deal of trouble to use the word "would," [sic] not "shall," . . . .

Id.

Second, even if the McGovern Amendment *is* mandatory, it requires only that the Secretary of State issue a favorable recommendation. Before the prohibition embodied in subsection (28) may be waived, that recommendation must be approved by the Attorney General, who has complete discretion not to do so. 8 U.S.C. § 1182 (d)(3) (1982). The Conference Report accompanying the McGovern Amendment expressly noted that "[t]his provision does not affect the authority of the Attorney General to deny waiver requests." H.R. Rep. No. 537, *supra,* at 32; *accord* S. Rep. No. 842, *supra,* at 17. The Attorney General is therefore not required to grant visas under subsection (28) to those applications which the Secretary of State is arguably required to support.

This fact has unfortunate consequences for the majority's reasoning. There are only two possibilities: that the Secretary of State and the Attorney General will behave disingenuously in order to evade the McGovern Amendment or that they will not.

As the majority indicates, maj. op. at 28 n.22, while the Attorney General retains the authority to decline to grant waivers for foreign policy reasons, it is unlikely that he would in fact make such determinations without guidance from the Secretary of State. Practically speaking, however, there is no way to prevent the Secretary of State from issuing a formal recommendation favoring admission, pursuant to his statutory duties as defined by this court, while also letting the Attorney General know that the granting of a waiver would prejudice the conduct of foreign affairs. Such behavior would render today's holding meaningless, but I can think of no way in which it could be policed. The majority suggests that its rule of independence is needed to ensure a mechanism for judicial review of a potentially disingenuous State Department. Maj. op. at 26-27 n.20. But since the Attorney General remains free to decline to grant the visa notwithstanding a favorable recommendation, and the Secretary of State is effectively able to urge him to do so, then, on the hypothesis of disingenuity, the majority's rule accomplishes nothing and is, therefore, unnecessary. The denial of a waiver remains "walled off from any effective challenge." *Id.*

I agree with the majority, however, that compliance with the McGovern Amendment, as now interpreted, is to be expected. We may anticipate that the State Department will adhere to the standard articulated today in all respects and will not take back in private the formal recommendations sent to the Attorney General, despite the fact that it possesses the power to do so. This is apparently the majority's expectation—in which case I am not at all certain why the mere fact that the State Department "possess[es] [the] power" to subvert the McGovern Amendment in other ways leads the majority to feel a prophylactic rule of sorts is necessary. Maj. op. at 26-27 n.20. It is puzzling that the majority posits both integrity and lack of integrity in the same Department in order to support different stages of its argument.

More importantly, if compliance with the spirit of its opinion is indeed the result the majority expects, it cannot claim that it has "preserve[d] the President's potency in this area." Maj. op. at 6-7 n.2. The majority supports that assertion by reference to the President's power, undisturbed by its opinion, to exclude aliens through the issuance of a Presidential Proclamation. However, if today's holding ultimately means that certain aliens may not be excluded save through such a proclamation, then the ability of the Executive to use the denial of visas for foreign policy purposes will be significantly diminished. In many instances, the use of a Presidential Proclamation would be diplomatic overkill and would lend an international importance to the person excluded that use of subsection (27) avoids. If such results are deemed unacceptable, many persons the Executive would like to exclude for good reasons will be allowed to enter, and he will be deprived of much of the flexibility and nuance that are essential in the conduct of foreign relations.

IV.

I am therefore left with plaintiffs' constitutional challenges. The statutory issues are somewhat complex; the constitutional issues are not. The Supreme Court precedent is clear and consistent.

Plaintiffs do not assert that the four unsuccessful visa applicants have any constitutional right to enter the United States. Instead, they assert their own rights, as listeners, to receive information. Such interests have been held to "implicate[]" first amendment rights and thus to confer standing in cases such as these. *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972). It is clear, however, that a potential listener who seeks a judicial declaration that the government's decision to exclude an alien is unconstitutional bears a difficult burden. That must be so if the right to listen, which *Kleindienst* recognizes, is not to destroy

the United States' sovereign power to control entry into its territory. The first amendment, it must be remembered, does not protect only speech uttered in a lecture hall or an auditorium, and the interest in receiving information can be asserted by any individual in this country who wishes to speak with an alien. *See id.* at 768. Because the exclusion of aliens remains "a fundamental act of sovereignty," *Knauff* v. *Shaughnessy,* 338 U.S. at 542, the Supreme Court has held

> that when the Executive exercises this power . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Kleindienst v. *Mandel,* 408 U.S. at 770.

In support of their first amendment argument, plaintiffs cite approximately twenty Supreme Court decisions, only one of which, however, deals with constitutional review of immigration law. There is in fact an unbroken line of decisions limiting the scope of judicial review in this area, of which *Kleindienst* is only one of the more recent. The Supreme Court has repeatedly held that the power to exclude aliens is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210 (1953). *Accord Regan* v. *Wald,* 104 S.Ct. 3026, 3039 (1984); *Fiallo* v. *Bell,* 430 U.S. 787, 792 (1977); *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 589 (1952); *see also Galvan* v. *Press,* 347 U.S. 522, 531 (1954) ("that the formulation of [immigration] policies is entrusted to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Plaintiffs' primary legal claim is that the first amendment forbids the Executive from making decisions to exclude based on the content of an applicant's political

beliefs. Such an assertion is wrong as a matter of law, and irrelevant to the case at bar. It is wrong as a matter of law because it describes the lower court holding *reversed* by the Supreme Court in *Kleindienst* v. *Mandel. Mandel* v. *Mtichell,* 325 F. Supp. 620 (E.D.N.Y. 1971) (three-judge court). In upholding the refusal of the Attorney General to grant a waiver to Mandel from the mandatory exclusion of subsection (28), the *Kleindienst* Court necessarily upheld the consitutionality of the exclusion of communists required by subsection (28)—indisputably an exclusion based upon Mandel's political beliefs.

In any event, plaintiffs' characterization of the government's conduct in these cases is simply inaccurate. The government does not here enforce a policy of making decisions to exclude based on the content of applicants' political beliefs, but has instead chosen to exclude applicants who are members of or connected with particular foreign governments. By wrongly equating the two policies, plaintiffs mischaracterize the United States' action as "content-based censorship." Brief for Appellants at 56. Even if that were correct, as I have already shown, plaintiffs would not automatically prevail in the legal context of visa denials. It is idle to pretend that the United States is attempting to prevent certain ideas from reaching the American people. Those ideas are part of our domestic and international political discourse and their expression in this country is fully protected by the first amendment. *Kliendienst* demonstrates that the additional right to have particular aliens come here to express those ideas is limited by our government's plenary power over the admission of aliens. But, in any case, plaintiffs' description of what is taking place here is wrong. The existence of ideological differences between the United States and a foreign government does not mean that a denial of visas to persons affiliated with that government is an exclusion resting solely on the content of the applicants' political beliefs. Classifications of the sort involved here have been upheld in the past against first amendment challenges. *Zemel* v.

Rusk, 381 U.S. 1 (1965), upheld restrictions on travel by American citizens to Cuba. Preventing Americans from travelling to a foreign country is certainly not less serious constitutionally than preventing that country's citizens from coming here. The government's actions at issue in these cases obviously withstand the limited judicial scrutiny defined by the *Kleindienst* standard.

Plaintiffs briefly offer one other constitutional argument—that the board discretion delegated to the Executive in subsection (27) violates principles of separation of powers. Plaintiffs have chosen an especially inhospitable legal environment in which to attempt the resuscitation of the non-delegation doctrine, for it is in the context of foreign affairs that the Supreme Court has repeatedly upheld the legitimacy of broad and discretionary Executive power. "[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature," statutes conferring authority upon the President to conduct foreign affairs have necessarily been less detailed and specific than statutes concerned with domestic affairs. *Zemel* v. *Rusk,* 381 U.S. at 17. *See supra* Part II, and cases cited there. This constitutional argument is therefore no more substantial than plaintiffs' first amendment claim.

V.

In an affidavit filed below, Under Secretary Eagleburger stated:

> The overwhelming majority of NIV applications involve only ordinary circumstances of aliens seeking to visit the United States for reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government.

> Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

J.A. at 137. This description of State Department policy is compatible with the statutes governing the issuance of non-immigrant visas, statutes which are constitutional under all applicable Supreme Court precedent. In the area of immigration law, "interwoven" as it is with "the conduct of foreign relations," *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 588-89 (1952), Congress has traditionally delegated—and the courts have respected—broad and discretionary Executive authority.

The majority's opinion is a cautious one: major issues presented in this litigation are left for subsequent resolution. Yet that virtue seems to me inadequate. The majority's constricted method of statutory construction, which is inconsistent with *Chevron,* its insufficient appreciation of the weight to be accorded the context of foreign policy in which this case arises, and its lack of deference to the determinations of the Department of State combine to produce an unnecessary remand. They seem likely ultimately to produce an incorrect and unfortunate result in this litigation. By itself that may not be very serious, although we have no way of knowing, but today's approach is capable of creating a series of similarly unfortunate results in other cases implicating foreign policy. If the approach employed here is repeated, then the majority opinion begins, albeit cautiously, a process of judicial incursion into the United States' conduct of its foreign affairs. For that reason, and because I believe that the law and the public record before us require affirmance of the district court's grant of summary judgment, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

[Filed July 27, 1984]

OPINION

These cases present the question whether the Secretary of State[1] is required to issue visas to aliens whom plaintiffs—citizens and residents of the United States—have in-

[1] The Secretary of State and the Attorney General both have responsibilities concerning the admission of aliens. See 8 U.S.C. § 1103, 1104. These cases involve primarily the powers and responsibilities of the Secretary.

vited to come to the United States for the purpose of associating with them and hearing them speak on issues of public concern.

While there are a number of subsidiary questions in these cases, the legal issue which ultimately governs is relatively straightforward. In *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Supreme Court decided that, in view of the broad authority vested by the Constitution in the Congress and the Executive over the admission of aliens and the conduct of foreign affairs, the Judiciary may do no more, in circumstances such as these, than to inquire whether the government has provided a "facially legitimate" explanation for its refusal to permit an alien to enter. If such an explanation is given, a court is not free to question the underlying policy or the wisdom the decision, but it must defer to the political branches. As discussed below, facially legitimate reasons have been provided here, and the decision of the Secretary will therefore be upheld.

I

Abourezk (C.A. No. 83-3739) involves an invitation extended by several of the plaintiffs to Tomas Borge, Interior Minister of Nicaragua, to come to the United States for various purposes. Some of the plaintiffs state they wish Mr. Borge to engage in a five-day speaking tour; others, who are members of Congress, assert that they want to meet with Mr. Borge privately to gain his perspective on Central American affairs; still others, who are journalists, claim that they intend to interview Mr. Borge; and several university professors allege that they wish to have Mr. Borge speak at a university or before religious groups.

Cronin (C.A. No. 83-3895) involves an invitation extended to Nino Pasti, a former member of the Italian Senate and of the Italian armed forces, and the present

president of an organization named Lotte per la Pace (Struggle for Peace). According to the Department of State, Mr. Pasti is also an active participant in the activities of World Peace Council, an instrumentality of the Soviet government. Mr. Pasti was invited to speak at one or more rallies sponsored by two organizations—the Mobilization for Survival and the New England Campaign to Stop the Euromissiles—which are seeking to change United States nuclear policies through public demonstrations and other means.

City of New York (C.A. No. 83-3741) involves an invitation extended by the Commission on the Status of Women, a New York City agency, to Olga Finlay and Leonor Rodriguez Lezcano, two Cuban women, who are said by plaintiffs to have special expertise on the status of women in Cuba. According to the government, both are members of the Federation of Cuban Women, an instrumentality of the Cuban Communist Party. Ms. Finlay and Ms. Lezcano were invited to come to the United States to speak in New York City, at several universities across the country, and at such organizations as the Third World Women's Project, and the Committee on Religion, Ethics, and Social policy.

Each of the invited aliens applied for a visa[2] at the appropriate American consulate or embassy.[3] Because the applications involved possible denials for foreign policy reasons, they were forwarded for review to the Assistant Secretary of State for Consular Affairs in Washington, in

---

[2] It appears that Mr. Borge had on a previous occasion applied for and been granted a visa which he never used. Mr. Pasti had also previously been granted visas some of which he used for travel in the United States and at least one of which he did not use. Ms. Lezcano had not previously sought a visa, but Ms. Finlay had sought and obtained visas on prior occasions.

[3] The visas for Ms. Finlay and Ms. Lezcano were submitted by the Cuban Ministry of Foreign Relations on their behalf by a diplomatic note to the United States consular officer in Havana.

accordance with standing instructions,[4] and at least some of them were also reviewed by then Under Secretary of State Lawrence Eagleburger. Eventually, the consular officers were instructed by the Department of State that the entry and the proposed activities of the aliens would prejudice the conduct of United States foreign affairs, and that the visas were to be denied pursuant to section 212(a)(27) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1182(a)(27) (hereinafter referred to as subsection (27)). The alien applicants were informed accordingly.

These actions followed. Presently pending before the Court is the government's motion for summary judgment.

II

Plaintiffs do not contend that either the Constitution or any law grants to the invited aliens[5] the right to enter the United States. As indicated *infra,* such an argument would lack validity in any event. Rather, the claim is that the American plaintiffs were deprived of their rights under the First Amendment and under the Immigration and Nationality Act when they were denied the opportunity to associate with their invitees and to hear their speech in this country. Before examining these claims in detail, it is helpful to consider first the *Kleindienst* case *supra,* which resolves many of the issues underlying plaintiffs' claims.

In *Kleindienst,* Ernest E. Mandel, a Belgian journalist and editor, was invited by a graduate student association at Stanford University[6] to participate in a conference on Technology and the Third World and thereafter to lecture at other major universities and conferences. Section

---

[4] Foreign Affairs Manual, vol. 9 (Visa T1-880, ¶1).

[5] An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(3).

[6] The University itself endorsed the invitation.

212(a)(28) of the Act excludes from the United States, among others, aliens who advocate communism or the establishment in the United States of a totalitarian dictatorship, and Mr. Mandel apparently was excludable as being in that category. Unlike the ban in subsection (27), that in subsection (28) may be waived by the Attorney General upon the recommendation of the Department of State.[7] No waiver was granted, and Mr. Mandel's application for a visa was rejected.

In the *Kleindienst* suit, the alien's sponsors made many of the same arguments that are advanced by the plaintiffs in this action. The Supreme Court sustained some of these contentions, and it rejected others. Thus, the Court held that an alien invitee has no personal constitutional right to enter this country; that insofar as his sponsors are concerned, they have a right under the Constitution not only to dissiminate information and ideas but also to receive them; and that the possible availability of alternative means of receiving information and ideas (*e.g.*, telephone hook-ups, tapes, visits to a foreign country) does not extinguish or displace altogether this constitutional right.

Having said that, the Court, after reiterating the familiar rule that Congress has plenary power over the admission of aliens, went on to hold that the First Amendment rights of individuals who wish to meet and speak with an alien do not necessarily override the power of the Executive, delegated by Congress, to deny waivers of the subsection (28) prohibition. Finally, the Court stated that:

> Appellees seek to soften the impact of this analysis by arguing . . . that the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver. . . . The Government would have us reach this question, urging a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any

---

[7] See 8 U.S.C. § 212(d)(3)(A).

> reason or no reason may be given. . . . This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.[8]

408 U.S. at 769.

The instant cases do not permit a decision based on the precise *Kleindienst* factors,[9] and the Court must therefore decide whether the Department of State has given a "facially legitimate and bona fide" reason for denying visas to the aliens who sought entry here.

III

All three cases present two basic questions[10] – the mean-

---

[8] The reason given was that the alien had abused visas previously granted to him by going beyond the stated purposes of his trip.

[9] None of the four aliens here involved has a record of abuse of visas.

[10] The government also argues that the Court lacks subject matter jurisdiction, that plaintiffs have no standing to sue, and that the complaint fails to state a claim upon which relief may be granted. Plaintiffs, for their part, assert that the case is not ripe for summary judgment because there are contested issues of fact. The Court rejects all these arguments.

The Supreme Court in *Kleindienst* considered the merits of the claim without discussing any of the preliminary issues here raised by the government – which it presumably would not have done had it had doubts about such matters as jurisdiction or standing.

In any event, courts have frequently exercised subject matter jurisdiction where it was alleged that First Amendment violations had occurred in the administration of the Immigration Act (see *e.g., Fiallo* v. *Bell*, 430 U.S. 787 (1977); *Burrafato* v. *Department of State*, 523 F.2d 554, 556 (2d Cir. 1975)), and they have likewise found jurisdiction where a citizen claimed misapplication of the Act with respect to an alien with whom he had some relationship. See, *e.g., Karmali* v. *INS*, 707 F.2d 408 (9th Cir. 1983); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3rd Cir. 1977); *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757 (D.C. Cir. 1974). Such 19th century decisions as *The Chinese Exclusion Cases*,

ing of subsection (27) and the constitutionality of the

---

130 U.S. 581 (1884), upon which the government relies, have largely been ignored in favor of a more enlightened jurisprudence. It should also be noted that the decision here was made not by a consular official stationed abroad but by high-level State Department officials pursuant to general guidelines. Thus, decisions which have refused to consider discretionary determinations of consuls (*e.g.*, Gomez v. *Kissinger*, 534 F.2d 518 (2d Cir. 1976)) have only limited application.

Many of the cases which have upheld jurisdiction in these circumstances also support plaintiffs' position on standing. See *Fiallo* v. *Bell, supra; Burrafato* v. *Department of State, supra; Pesikoff* v. *Secretary of State, supra.* Plaintiffs have suffered injury-in-fact and that injury is not vitiated merely because it may be shared by many others. See *Heckler* v. *Mathews*, 104 S.Ct. 1387 (1983); *Lamont* v. *Postmaster General, 381 U.S. 301 (1965).* The cited cases also dispose of the government contention that plaintiffs are not within the zone of interests regulated by the statute or by the First Amendment. *See also, Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

As for the government's assertion that the complaint does not state a claim upon which relief may be granted, the only arguments seriously pressed are mootness and ripeness. However, in view of the government's broad defense of its actions, plaintiffs have every reason to fear that the allegedly unlawful activity will continue. See *Kolendar* v. *Lawson*, 103 S.Ct. 1855 (1983); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). It may well be that American citizen standing would be lacking if there were not a reasonable nexus between them and a particular alien invitee. However, that is not so here.

Plaintiffs, as indicated, argue that these cases are not ripe for summary judgment. However, none of the factual issues they raise (whether subsection (27) has been used in the past to exclude aliens on foreign policy grounds, whether the government's actions are a strategem to escape congressional restrictions on subsection (28), whether the content of the aliens' speech and their political beliefs played a role in the Executive's decision to exclude them, and whether the foreign policy concerns asserted are of sufficient magnitude) represents a genuine issue of material fact. To the extent that these questions are not irrelevant, they represent issues of law or policy, or they are resolved by the Eagleburger *in camera* affidavits. See Part V infra.

government's actions.[11] These will now be examined in turn.

Subsection (27) provides that members of the following class of aliens are ineligible to receive visas:

> Aliens who the consular officer . . . knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States.

Plaintiffs raise two statutory construction points apart from their First Amendment claims.

First. Plaintiffs contend that subsection (27) speaks only of an alien's *activities* which might jeopardize the public interest or security, in contradistinction to aliens whose *entry or presence* in this country might have such an effect. In that view, the government may not, under that subsection, exclude an alien unless there is some reason to believe that he will engage in offensive *conduct*. To put it another way, plaintiffs argue that the statute does not permit the Department of State to exclude an alien whose conduct is presumed to be benign but whose presence alone in this country is regarded as prejudicial to the public interest interest, welfare, or security of the United States.

On a strictly textual basis, that contention is not unpersuasive, for the statutory provision mentions only "activities." However, in this context at least, the distinction between an alien's activities and his presence in the United

---

[11] Plaintiffs argue that if the government's construction of the statute is correct, it is unconstitutional under the First Amendment; or, in the alternative, that it should be construed narrowly to avoid an unconstitutional result. In the present context, the considerations governing these alternative contentions do not differ materially, and the two arguments will therefore be considered together. See Part IV *infra*.

States is one without a difference. The best proof of that proposition is the case of the former Shah of Iran. The mere entry of the Shah into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Teheran and all that flowed from that episode, including ultimately the loss of life in connection with the abortive rescue operation.[12] It is thus not surprising that the Executive, in construing subsection (27), has not made the distinction plaintiffs ask the Court to draw. Moreover, in the one decision that addressed this issue—*El-Werfalli* v. *Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982)—the court concluded that the mere presence of an alien in the United States was sufficient to trigger the subsection (27) prohibition even though the government did not suggest that he would engage in any offensive activities while here.[13]

Second. Plaintiffs argue next that the thrust of subsection (27) is to ensure the safety and security of the United States, and that an alien may therefore not be denied entry for foreign policy reasons and objectives which, according to plaintiffs, fall in a different category. That argument ignores a substantial part of the statute; *i.e.*, its reference to activities which may be prejudicial to the "public interest" and to those which might endanger the "welfare" of the United States. Leaving to one side the question whether these terms are so vague and broad that

---

[12] Needless to say, the Court has neither the authority nor the ability to determine whether that policy decision was the proper one under the circumstances. All that it considers here is that the Shah's presence in this country had substantial consequences in terms of the public interest and the security of the United States. Whether the consequences in that or in future cases outweigh other considerations (*e.g.*, the earlier cooperation of the Shah with the United States), is a decision for the President and his subordinate officers, not for a court or a private citizen.

[13] El-Werfalli was a Lybian national who sought to enter the United States solely to attend school.

they lend themselves to the suppression of speech that the government finds inconvenient (see note 19 *infra*), it is clear that the statutory terms embrace harm to foreign policy interests if they mean anything beyond strictly domestic security concerns. Moreover, it appears that the statute has consistently been so interpreted ever since the Immigration and Nationality Act was enacted in 1952, by several different Administrations of both political parties.[14] See also, *Haig* v. *Agee*, 453 U.S. 280 (1981); *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719 (1975).

These conclusions are not undermined by the so-called McGovern Amendment.[15] As indicated, subsection (28) excludes from the United States aliens with communist affiliations, but it goes on to vest authority in the Attorney General to waive that restriction. While that official has apparently exercised his waiver authority on numerous occasions, he refused several waivers for foreign policy reasons. The McGovern Amendment directed the Attorney General not to exercise his waiver authority on this basis,[16] and plaintiffs deduce from that legislative action that foreign policy interests may not be considered under the Immigration and Nationality Act. However, subsection (27) is a much more closely targeted, narrow provision than is subsection (28) and, as indicated below,[17] it has been used only a few dozen times each year. More-

---

[14] Congress was advised of the exclusion for policy reasons of Thomas Liaou, an advocate of Formosan independence (1958, 1961, 1962); Otto Skorzeny, a former Nazi SS officer (1959), and Mme. Ngo Dinh Nhu, sister-in-law of the former prime minister of Vietnam (1964).

[15] P.L. 95-105, 91 Stat. 848 (1977), 22 U.S.C. § 2691.

[16] Under the amendment, the Attorney General may deny waivers only with respect to aliens who pose a threat to United States "security interests."

[17] See note 26 *infra*.

over, as stated above, unlike subsection (28), the provision under consideration here does not authorize waivers at all, but it provides instead that an alien in the excludable class "shall" be ineligible for admission to the United States.

It is, of course, sometimes difficult to know precisely what the Congress intended, and the present situation is no exception. It may be that, by explicitly prohibiting the practice of denying subsection (28) waivers for foreign policy reasons, Congress meant to signal the Executive not to consider such reasons at all in its exclusion policy; or it may be that, by confining its prohibition to subsection (28), it did not intend to disturb the Executive's long-standing policy and practice of using subsection (27) for foreign policy reasons in addition to other reasons that may be encompassed under "public interest" or "welfare . . . of the United States." In view of the substantial independent authority the Executive possesses in the fields of foreign relations and the admission of aliens, the Court would not be justified in interpreting the congressional action with respect to subsection (28) as a prohibition on Executive power generally unless the expression of legislative intent were far more clear than it is in this instance.

For these reasons, the Court concludes that, on its face, the statute sanctions the denial of the visas at issue here.

IV

There are, of course, significant First Amendment implications to the statute. The Supreme Court has held that the First Amendment protects not only speech but also the right to receive information and ideas.[18] These plaintiffs claim accordingly that they are entitled to have the invited aliens enter the United States because they wish to exercise

---

[18] In addition to *Kleindienst* v. *Mandel, supra,* see *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386-90 (1969); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965).

that right.[19] It is not an answer to say—as the government does—that there are alternative means (mails, television, travel abroad) to receive the message of these aliens, for as the Court said in *Kleindienst,*

> we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutinal interest on the part of the appellees in this particular form of access.

408 U.S. at 765.[20]

However, it is also clear that consideration of the First Amendment does not end the inquiry, for the interest of citizens in being the beneficiaries of ideas from others must be considered in juxtaposition to the authority of the Congress and the Executive to regulate and conduct foreign relations. Moreover, under *Kleindienst,* where the basis for the visa denial bottomed on that authority is "facially legitimate and bona fide," the courts' role is at an end: they must defer to the Executive decision.

The government argues that, by its submission of Under Secretary Eagleburger's affidavit, it has provided a facially legitimate, bona fide basis for refusing entry to the four aliens. However, that affidavit it entirely conclusory; it states only that the entry of the particular aliens "would have been prejudicial to the conduct of the foreign affairs of the United States." Such conclusory statements might be adequate under some circumstances; they are not here.

---

[19] Plaintiffs also claim that, as construed by the Department of State, subsection (27) is overly broad and void for vagueness. But in foreign affairs matters and those involving the admission of aliens, the political branches have the widest possible latitude in these respects. See *Dames & Moore* v. *Regan,* 453 U.S. 654, 678-79 (1981). It appears that no immigration statute has ever been invalidated on such grounds.

[20] At least as to Ms. Finlay and Mr. Lezcano, there is doubt whether their American sponsors could visit them in Cuba. See *Regan* v. *Wald,* ___U.S. ___ *(June 28, 1984); Zemel* v. *Rusk,* 381 U.S. 1 (1965).

In the absence of additional details, it could reasonably be concluded that the Department of State denied visas to these alien applicants because it did not agree with or feared the content of whatever communication they might make while in this country.[21] This conclusion would be especially relevant in these cases where the visa denials were defended, at least in part, on the ground that the Department of State considered the aliens' proposed "activities" in the United States to be prejudicial—yet the only activities that had been planned were protected speech and association.[22]

In the view of the Court, an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message. For although the government may deny entry to aliens altogether, or for any number of specific reasons, it may not, consistent with the First Amendment, deny entry solely on account of the content of speech. *Regan* v. *Time, Inc.*, 52 U.S.L.W. 5084 (July 3, 1984); *Heffron* v. *International Society,* 452 U.S. 640, 648 (1981); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95-96 (1972).[23]

---

[21] The *Kleindienst* reason, by contrast, was susceptible of objective inquiry and verification. See note 8 *supra.* See also, *El-Warfalli* v. *Smith, supra* 549 F. Supp. at 153-54.

[22] The term "public interest" in Subsection (27), standing alone, could be construed to permit the denial of a visa solely because the applicant might, once here, speak in opposition to the foreign policy interests of the government, the presumed theory being that the government's policy may be equated with the public interest. Indeed, government counsel asserted that unpalatable speech would be a valid reason for exclusion. It should be noted, however, that Under Secretary Eagleburger averred that he was "aware of no instance in which a [non-immigrant visa] request has been denied for reasons of foreign policy simply because the applicant was critical of our policies and objectives."

[23] Special circumstances may permit an exception to this rule. For example, an alien could probably validly be excluded if he is not mere-

For these reasons, the Court rejects both the argument of plaintiffs that the government lacks the power to exclude pursuant to subsection (27) unless it can be shown that there will be a direct threat to national security, and that of the government that incantation of the phrase "foreign policy objectives" is sufficient to end the Court's inquiry. Plaintiffs' theory, if adopted, would not adequately protect the national interest in its foreign relations; the government's theory would allow it to exercise its foreign relations power so as to keep the content of speech from American citizens.

In view of these holdings, the specific reasons for the exclusion of these four aliens thus assume paramount importance and that issue, as discussed below, requires the Court to consider the classified affidavits submitted by the government.

V

The government has offered for the Court's *in camera* inspection a classified affidavit of Under Secretary Eagleburger with respect to each of the three cases. Plaintiffs object to such an inspection, arguing that they have the right to view these affidavits and to contest the facts and conclusions they contain. It thus becomes necessary, initially, to determine whether the Court should avail itself of the Department's offer to review the Eagleburger affidavits on this basis.[24]

While consideration of documents outside the usual adversary process is certainly not desirable,[25] the Court

---

ly a citizen but a high official of a foreign nation whom the Executive could exclude or expel as *persona non grata* on any basis whatever. See 8 U.S.C. § 1102; H. Rep. No. 1365, 82d Cong., 2d Sess. 34 (1952).

[24] On July 5, 1984, the Court issued an order for the submission of the affidavits without prejudice to either party's position on the *in camera* inspection issue.

[25] However, because classified documents are involved, this kind of

has concluded that the alternatives to such consideration are even more unpalatable. The Court has already held that the particular visa denials involved here could not be upheld on the basis of the open record alone. To find the conclusory statement that the entry of a particular individual would be contrary to United States foreign policy objectives to be a "facially legitimate reason would be to surrender to the Executive total discretion even in cases such as these where it is claimed—and the claim is not implausible—that entry is being denied solely on account of the content of the alien's proposed speech. Moreover, judicial scrutiny of the specific reasons for denials of entry will have the beneficial effect of preventing both a mushrooming of exclusions based on the provision here at issue[26] and content-based denials.[27]

Equally unsatisfactory is the solution proposed by plaintiffs: to disregard the *in camera* affidavits, at least unless they are subjected to the full adversary process. The affidavits in this case—and presumably in future cases—are both classified and highly sensitive, and they therefore could not be subjected to that process. At the same time, the Court would not be justified in overruling the Secretary's decision merely because the specific reasons therefor cannot be made public. To do so would be to run afoul of the Supreme Court's mandate in *Kleindienst* that the

---

procedure is not unusual. See *Hayden* v. *National Security Agency*, 608 F.2d 1381 (D.C. Cir. 1979); *Phillippi* v. *Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir.1976).

[26] The Department asserts that, until now, of the millions of non-immigrant visas sought every year, the total number denied pursuant to subsection (27) for each of the last ten years has ranged from sixteen (FY75 and FY80) to sixty-three (FY76). During the last twenty years, almost 70 million non-immigrant visas were issued, and 519 were denied under subsection (27). Affidavit of Deputy Assistant Secretary of State Louis P. Goelz.

[27] The mere existence of judicial scrutiny, albeit in an *in camera* setting, is likely to have a deterrent effect in this regard.

courts must defer to the political branches where the reasons for the denials are bona fide on their face.[28]

The Court has accordingly reviewed the Eagleburger affidavits *in camera*. On the basis of that review, it has concluded that facially legitimate reasons exist for denying visas to the four individuals whose entry is being sought in these actions. Essentially, these applicants were not denied entry because of the content of the expected speeches, but because of their personal status as officials of governments or organizations which are hostile to the United States. According to Under Secretary Eagleburger, some of these entities are desirous of acquiring legitimacy and respectability, and the admission of their officials to the United States would further that goal;[29] while others operate under false pretenses insofar as they claim to be independent of hostile powers. Under *Kleindienst*, and indeed because of the limited role of the Judiciary with respect to foreign relations generally, the Court is required to accept as valid the judgment of the Executive Branch that the foreign affairs of the United States would, in fact, be injured by the admission of aliens possessing these characteristics. Clearly, the reasons provided by the Executive are "facially legitimate." The government's motion for summary judgment will therefore be granted.

/s/ HAROLD H. GREENE
United States District Judge

---

[28] In *El-Warfalli* v. *Smith, supra*, the Court considered classified information, and the Court is advised that the U.S. District Court for the District of Massachusetts, where an action similar to these is pending, has likewise agreed to consider a classified affidavit *in camera*. *Allende* v. *Schultz*, No. 83-3984-C.

[29] Plaintiffs argue that alternative means may be available for denying legitimacy to hostile individuals or organizations (*e.g.*, by advising foreign governments that admission based on First Amendment considerations does not imply endorsement by the United States). Neither the Court nor plaintiffs are empowered to make such foreign policy judgments.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS

v.

RONALD W. REAGAN, ET AL., DEFENDANTS

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

[Filed July 27, 1984]

ORDER

For the reasons stated in the Opinion filed this date, it is this 27th day of July, 1984,

ORDERED That defendant's motion for summary judgment be and it is hereby granted, and it is further

ORDERED That these actions be and they are hereby dismissed.

/s/ HAROLD H. GREENE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673
Civil Action No. 83-03739

JAMES ABOUREZK, ET AL., APPELLANTS

v.

RONALD WILSON REAGAN, PRESIDENT OF THE
UNITED STATES, ET AL.,

No. 84-5681
Civil Action No. 83-03741

CITY OF NEW YORK, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.,

No. 84-5708
Civil Action No. 83-03895

BRUCE CRONIN, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.,
DEFENDANTS

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

JUDGMENT

Before: EDWARDS, GINSBURG, and BORK, Circuit Judges.

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: March 11, 1986
Opinion for the Court filed by Circuit Judge Ginsburg.
Dissenting opinion filed by Circuit Judge Bork.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673
CA No. 83-03739

JAMES ABOUREZK, ET AL.

v.

RONALD W. REAGAN, PRESIDENT OF THE
UNITED STATES, ET AL., AND CONSOLIDATED CASES

[Filed May 23, 1986]

BEFORE: Edwards, Ginsburg, and Bork, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court
GEORGE A. FISHER,
CLERK

By: /s/ ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Bork would grant the petition for rehearing.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673
CA No. 83-03739

JAMES ABOUREZK, ET AL.

v.

RONALD W. REAGAN, PRESIDENT OF THE
UNITED STATES, ET AL., AND CONSOLIDATED CASES

[Filed May 23, 1986]

BEFORE: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman and Buckley, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc,* has been circulated to the full court. A vote was requested but a majority of judges in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion for rehearing *en banc* is denied.

Per Curiam
For The Court
GEORGE A. FISHER,
CLERK

By: /s/ ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Scalia, Starr, Silberman and Buckley would grant the suggestion for rehearing *en banc.*

Circuit Judges Wright and Mikva did not participate in this order.

APPENDIX G

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, LAWRENCE S. EAGLEBURGER, depose and say as follows:

1. I presently serve as the Under Secretary of State for Political Affairs. I have previously provided unclassified testimony in the above-captioned matter, which concerns the November, 1983, denial of an application on behalf of Nicaraguan Interior Minister Tomas Borge (hereinafter, "Borge") for a nonimmigrant visa (hereinafter, "NIV"), and offer the following in supplementation thereof.

2. I am familiar with the facts and circumstances pertinent to the denial of the NIV in question, and provide this additional *in camera* testimony based both upon my personal knowledge and information which is available to me in my official capacity. The contents of this affidavit are highly sensitive and have been properly classified in accordance with Executive Order 12356.

3. Borge was, and remains, one of the highest ranking, most radical and influential members of the Sandinista regime. His aggressively Marxist orientation, his activities as Interior Minister of Nicaragua and his private and public pronouncements set him squarely at odds with many important United States foreign policy goals and objectives in Central America. Moreover, as a high level official of the Revolutionary Government of Nicaragua, Borge's actions and statements are accorded great weight by other countries in the region. Conversely, any actions which the United States takes regarding Borge are viewed by other Central American countries as reflecting United States foreign policy orientation.

4. One of the principal bases for my decision to deny Borge's NIV application was that Borge intended to travel to the United States *in his official capacity* as a high rank-

ing member of a foreign government which advances many foreign policy goals that are directly opposed to those of the United States. In this connection, it bears particular emphasis that Borge's visa application was transmitted to the Embassy in Nicaragua by the Nicaraguan Ministry of Foreign Affairs under cover of a diplomatic note and that the accompanying passport was "diplomatic". In my experience, visits to the United States by high level foreign government officials (as opposed to private persons) inevitably have foreign policy consequences. If Borge were to apply for a visa in the future for official government business, the visa might be issued, depending on the international political climate at the time of such application and the purpose of the visit.

5. The international political context is of overriding significance with respect to any decision I make concerning the denial of a visa on foreign policy grounds. In the case of Borge, for example, I determined that his entry into the United States, given the timing of the proposed visit and the stated purpose thereof, would have sent a very wrong message to our allies and adversaries alike concerning United States policies in Central America, and could have had a severely adverse impact on ongoing multilateral efforts by the United States to resolve the current conflict in that region through the "Contadora Group" (i.e., Mexico, Venezuela, Colombia, Panama, Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala).

6. My conclusion that Borge's visit at that time could have had a strong adverse effect on the Contadora Group negotiations was, in turn, buttressed by the adverse foreign policy consequences that resulted from the October, 1983 visit of Nicaraguan Foreign Minister Miguel D'Escoto to this country. D'Escoto took political advantage of his visit to undercut the Contadora multilateral negotiations by publicly advancing a series of proposed

bilateral agreements. D'Escoto's bilateral proposals, and the publicity afforded them by virtue of his presence in the United States, raised concern among United States friends in Central America that the United States was considering, to their possible detriment, direct bilateral negotiations with Nicaragua—concerns which the United States was at great pains to dispel over the ensuing weeks and months through vigorous diplomatic efforts.

7. Therefore, I determined that travel to the United States at that time by Nicaraguan Interior Minister Borge would have been highly prejudicial to the foreign policy interests of the United States, principally because of the repeated efforts by the Revolutionary Government of Nicaragua and its officials to subvert and undermine the regional negotiation process, which was theretofore successful (from the perspective of United States foreign policy), albeit fragile. In my considered judgment, Borge's visit at that time would have seriously damaged prospects for the successful continuation of that delicate diplomatic process.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

APPENDIX H

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, LAWRENCE S. EAGLEBURGER, depose and say as follows:

1. I presently serve as the Under Secretary of State for Political Affairs. I have previously provided testimony in the above-captioned matter concerning the October 8, 1983 denial of applications of Ms. Olga Finlay and Ms. Leonor Lezcano (hereinafter, "Finlay" and "Lezcano", respectively) for nonimmigrant visas (hereinafter, "NIV"), and offer the following in supplementation thereof.

2. I am familiar with the facts and circumstances pertinent to the denial of the NIVs in question, and provide this additional *in camera* testimony based both upon my personal knowledge and information which is available to me in my official capacity. The contents of this affidavit are highly sensitive and have been properly classified in accordance with Executive Order 12356.

3. Both Finlay and Lezcano are officials of the Federacion de Mujeres Cubanas (Federation of Cuban Women; hereinafter, the "FMC"), a "mass organization" charged by the Communist Party of Cuba with increasing the social, political and economic activism of Cuban women. The FMC is headed by Ms. Vilma Espin, Alternate Member of the Politburo of the Cuban Communist Party Central Committee. The principal function of the FMC—like that of other organizations subsumed under the Central Committee—is to promote and advance the policy goals and objectives of the Communist Party of Cuba.

4. Significantly, the Cuban General Directorate of Intelligence (hereinafter, "DGI") has a special section on intellectual and academic affairs which routinely employes people like Finlay and Lezcano to influence and exploit

various groups in the United States (e.g., university groups, women's organizations, Cuban-American associations and research institutes) by encouraging them to accept a positive image of the Cuban Revolution and Cuban society.

5. It bears particular emphasis that Finlay and Lezcano intended to travel to the United States not as private Cuban citizens, but rather as official representatives of the Cuban Government, as evidenced by the fact that their visa applications were submitted by the Cuban Ministry of External Affairs and were accompanied by "diplomatic" passports. In my experience, visits to the United States by such foreign government representatives invariably raise foreign policy considerations. Under certain circumstances (described below) visas would be issued to the two women, and a visa was in fact issued to Finlay as recently as December, 1983.

6. The decision to deny visas to Finlay and Lezcano on foreign policy grounds cannot be fully understood absent some familiarity with United States policy regarding Cuba. The United States has had a long-standing policy to prevent Cuba, to the extent possible, from influencing other countries in Central and South America to adopt policies adverse to the interests of the United States. In furtherance of this policy, the United States has for many years and under a variety of administrations sought to deny for Cuba the aura of legitimacy which normal diplomatic relations with the United States would undoubtedly confer. Moreover, the United States applies a very restrictive travel policy toward Cuba and actively enforces a trade embargo against that country under the Trading With the Enemy Act. One particularly relevant aspect of United States policy toward Cuba has been to deny the entry of officials of the Cuban Communist Party or Government into the United States except for the purposes of (i) conducting bilateral discussions with United

States government officials or (ii) participating in meetings of international organizations. (For example, about the time the instant actions were filed, a visa was issued to Finlay for the limited purpose of participating in a Pan-American Health Organization function in Washington, D.C.)

7. In my capacity as Under Secretary of State for Political Affairs, I have personally determined that the denial of entry into the United States of officials of the Cuban Communist Party or Government, other than for the limited purposes described in paragraph 6, *supra*, is an important adjunct of United States foreign policy. I was apprised of the decision of then Assistant Secretary of State Diego Asencio to deny the October 1983 visa applications of Finlay and Lezcano and I ratified that decision as having been consonant with long-standing United States foreign policy toward Cuba. Finally, at the time I ratified Ambassador Asencio's decision to deny the visas to the two Cuban women I was satisfied that they were both Cuban Communist Party officials. In ratifying Ambassador Asencio's decision, I expressly concluded that issuance of the requested visas for the time and purpose stated in the applications would have been prejudicial to the foreign policy interests of the United States.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

APPENDIX I

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, LAWRENCE S. EAGLEBURGER, depose and say as follows:

1. I presently serve as the Under Secretary of State for Political Affairs. I have previously provided unclassified testimony in the above-captioned matter concerning the October 18, 1983 denial of an application by former Italian Senator Nino Pasti (hereinafter, "Pasti") for a nonimmigrant visa (hereinafter, "NIV"), and offer the following in supplementation thereof.

2. I am familiar with the facts and circumstances pertinent to the denial of the NIV in question, and provide this additional *in camera* testimony based both upon my personal knowledge and information which is available to me in my official capacity. The contents of this affidavit are highly sensitive and have been properly classified in accordance with Executive Order 12356.

3. [Classified material deleted.]

4. The WPC is a worldwide organization that presents itself as an independent advocate of nuclear disarmament, anticolonialism and national liberation movements. In fact, however, the WPC is both controlled and financed by the USSR.

5. More important for purposes of this action, however, is that the USSR seeks through the WPC, covertly, to influence, organize, manipulate and direct public opinion in the United States and other countries toward Soviet policies of unilateral Western disarmament, and to deflect attention from the military policy and actions of the Soviet Union.

6. The efforts of Soviet-front groups, including the WPC, to manipulate Western anti-nuclear movements have become increasingly apparent and aggressive over

the past several years. (To some extent, these efforts have been reported in the media.) Genuinely independent peace movements in a number of foreign countries have come under increasing strong pressure from Soviet-front groups and their affiliates to adopt a harsh, anti-U.S. policy line. These outside Soviet pressures have split the peace movement in some West European countries and have led to the expulsion of at least one Soviet diplomat from Denmark. In my considered judgment the Soviet Union, through its surrogates, including the WPC, seeks to manipulate certain anti-nuclear groups and activities as a means of advancing the Soviet goal of *unilateral* Western arms reduction or disarmament.

7. The Administration, at the highest levels, has determined that such covert manipulations and attempted subversion of legitimate peace and disarmament movements for the purpose of supporting the doctrine, propaganda and disinformation aims of the Soviet Union, an undisclosed foreign government principal, is directly contrary to the U.S. national interest, particularly in view of recent or ongoing discussions, negotiations and proposals related to potential disarmament or arms limitations and and reductions.

8. Accordingly, the Administration determined in 1982 that persons who are members of, or affiliated with, the WPC and who seek to enter the United States to further Soviet policy objectives, should be denied entry to the United States, except in limited circumstances not relevant here. A careful evaluation of Pasti's September 28, 1983 visa application, in light of the available intelligence information and the stated purpose of his proposed trip, led me to ratify the conclusion of the Assistant Secretary for Consular Affairs that his entry into the United States at that time would have been prejudicial to the foreign policy interests of the United States and that his visa should be denied.

9. In this connection, I wish to emphasize that the timing of Pasti's proposed visit coincided with the initial deployment of Cruise and Pershing II missiles in certain NATO countries—a particularly delicate period for United States foreign policy, and a period during which the Soviet Union was employing every propaganda tool at its disposal in an effort to frustrate the deployment. Based on all the information available, I have reason to believe that Pasti intended to use his visit to the United States, [classified material deleted] as a retired NATO general, to foster Soviet objectives that are inimical to the foreign policy interests of the United States.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40035